

91-533

(1)

Supreme Court, U.S.
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Case No.

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1990 Term

CHARLES J. ROGERS CONSTRUCTION,

a Michigan Corporation,

Petitioner,

v

TRUSTEES FOR MICHIGAN CARPENTERS

COUNCIL HEALTH AND WELFARE FUND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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THE QUESTION PRESENTED FOR REVIEW

WHETHER THE EMPLOYEE RETIREMENT INCOME
SECURITY ACT OF 1974 PREEMPTS STATE
CORPORATE REORGANIZATION LAW ?

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PRIOR OPINIONS IN THIS CASE

The United States Court of Appeals for the Sixth Circuit decided this case on May 10, 1901 and its opinion is reported in 933 F.2d 376 and reproduced in the Appendix to this Petition for a Writ of Certiorari. The decision of the Court of Appeals was a review of a decision of the United States District Court for the Western District of Michigan. There were several opinions and orders of the District Court which are pertinent to this Petition for a Writ of Certiorari. None of them were published. They are reproduced in the Appendix and are identified by title and date in the Index to the Appendix.

GROUNDS ON WHICH THE JURISDICTION OF
THE SUPREME COURT OF THE UNITED STATES
IS INVOKED

 The decision of the United States
Court of Appeals for the Sixth Circuit
was entered on May 10, 1991. The statute
which confers jurisdiction on this Court
is 28 U. S. C. 1254 (1).

 THE STATUTES WHICH ARE INVOLVED
IN THIS CASE

29 U. S. C. 1144 (a)

 Except as provided in subsection (b)
of this section, the provisions of
this title and title IV shall
supersede any and all state laws
insofar as they now or hereafter
relate to any employee benefit plan
described in section 4 (a).

29 U. S. C. 1144(b)(2)(A)

Nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

The Michigan Business Corporations Act,
Section 204; MCLA 450.1204

Sec. 204. The articles of incorporation may contain the following provision or the substance thereof: When a compromise or arrangement or a plan of reorganization of this corporation is proposed between this corporation and its creditors or any class of them or between this corporation and its shareholders or any class of them, a court of equity jurisdiction within the state, on application of the corporation or of a creditor or

a shareholder thereof, or on application of a receiver appointed for the corporation, may order a meeting of the creditors or class of creditors or of the shareholders or a class of the shareholders to be affected by the proposed compromise or arrangement or reorganization, to be summoned in such manner as the court directs. If a majority in number representing $\frac{3}{4}$ in value of the creditors or class of creditors, or shareholders or class of shareholders to be affected by the proposed compromise or arrangement or a reorganization, agree to a compromise or arrangement or a reorganization of this corporation as a consequence of the compromise or arrangement, the compromise or arrangement and the reorganization, if sanctioned by the court to which

the application has been made, shall be binding on all the creditors or class of creditors, or on all the shareholders or class of shareholders and also on this corporation.

Michigan Business Corporations Act,
Section 205; MCLA 450.1205

Sec. 205. (1) When the provision of 204 is included in the original articles of incorporation of a corporation, all persons who become creditors or shareholders thereof are deemed to have become creditors or shareholders subject in all respects to that provision, and it shall be binding upon them.

(2) When that provision is inserted in the articles of incorporation, by an amendment of the articles, all person who become creditors or

shareholders of the corporation after the amendment becomes effective are deemed to have become creditors or shareholders subject in all respects to that provision, and it shall be binding upon them.

(3) The circuit court may administer and enforce the provision and restrain, pendente lite, actions and proceedings against the corporation with respect to which the court so restraining has begun the administration or enforcement of the provision, and appoint a temporary receiver for the corporation and grant the receiver such powers as are deemed proper.

The Michigan Business Corporations Act,
Section 862: MCLA 450.1862

Sec. 862. (1) The corporation, in the manner provided in Section 861

but without limiting the generality or effect of that section, may amend or repeal its bylaws; constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of, or in addition to any director or officer then in office; amend its articles of incorporation, and make any change in its capital or capital stock, or any other amendment, change or alteration, or provision authorized by this act; be dissolved, transfer any part of its assets, and merge or consolidate as permitted by this act, but in any of these cases a shareholder does not have a statutory right of appraisal of his shares; change the location of its registered office and remove or appoint a resident agent;

authorize and fix the terms, manner and conditions of issuance of bonds, debentures or other obligations, whether or not convertible into shares of its capital stock of any class, or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of its capital stock of any class; and lease its property and franchises.

(2) Irrespective of any other provision of this act, the corporation may issue its shares of capital stock and its bonds for the consideration specified in the plan or reorganization after confirmation of the plan.

CONCISE STATEMENT OF THE CASE

The Respondent and nine other voluntary unincorporated trust funds

established pursuant to Section 302 of the Labor Management Relations Act; 29 U. S. C. 1001 et seq., brought this action under Section 301 of the Labor Management Relations Act; 29 U. S. C. 185 and Section 502 of ERISA; 29 U. S. C. 1132 to collect claimed arrearages, penalties, interest, liquidated damages and attorneys' fees for unpaid employer contributions to ERISA benefit plans.

The Petitioner and other business organizations and individuals were involved in the construction business and named by the Respondent and the other trust funds as defendants in the action described above.

Pursuant to Rule 3(c) of the Federal Rules of Appellate Procedure, as applied by this Court in Torres v. Oakland Scavenger Co., 487 U. S. 312 , 108 S.Ct

2405, 101 L.Ed.2d 285 (1988) and by the Sixth Circuit Court of Appeals in Minority Employees v Tennessee Dep't of Employment Sec., 901 F.2d 1327 cert. denied, ___ U. S. ___, 111 S. Ct. 210, 112 L.Ed.2d 170 (1990), the Court of Appeals ruled that the only parties before it were the Petitioner and the Respondent.

The Court of Appeals framed the issue, here pertinent, as follows:

This case involves an appeal . . . from a final judgement that the Employee Retirement Income Security Act of 1974 . . . , preempted state corporate reorganization law Trustees of Michigan Carpenters Council Health and Welfare Fund v C. J. Rogers, Inc. 933 F.2d 376, 377. Our jurisdiction over the cross-appeal is therefore restricted

to the only named party, the Michigan Carpenters Council Health and Welfare Fund.

Having determined that the defendant Construction is the only party properly before us on appeal, we further find that all issues on appeal are preserved with the exception of the claim that the district court erred in finding that Inc. was the alter ego of Construction and Excavating since Inc. failed to perfect its right to appeal. However, our holdings are subject to the restriction that the outcome affects only Construction. On cross-appeal, all issues raised are preserved, once again with the condition that our findings are applicable only to the Michigan Carpenters Council Health and Welfare Fund. Michigan Carpenters Council, supra, at pp 380-381.

Two of the Defendants, Charles J. Rogers Construction Company (Construction) and Chas. J. Rogers Excavating, Inc. (Excavating) experienced financial difficulties in July of 1979. They petitioned the Circuit Court of Genesee County for an arrangement of unsecured creditors pursuant to the Michigan Business Corporations Act; MCLA 450.1101-450.2098. An initial plan of arrangement was approved by the required creditors as spelled out in Section 204 of the Michigan Business Corporations Act; MCLA 450.1204 (a majority in number representing 3/4 in value) and approved by the Genesee County Circuit Court on March 22, 1980..

Construction and Excavating were unable to perform the approved arrangement and a second plan was

NATION IS NOT CONTINUOUS.

proposed to the Genesee County Circuit Court; a reorganization in which the assets of Construction and Excavating would be transferred to a new Michigan Corporation, created by the second plan, C. J. Rogers, Inc. (Inc.). Inc. was incorporated on May 1, 1980. This second plan was also approved in the manner used for approval of the initial arrangement.

The reorganization required Construction and Excavation to sell their tangible corporate assets (equipment) and assign there accounts receivable, some inventory and their uncompleted contracts to Inc. Inc. purchased tangible assets at fair market value, as distinguished from salvage value, by the issuance of promissory notes and preferred stock. Inc. assumed certain secured debt of Construction and Excavating owed to a bank and a bonding

company and other secured creditors represented by a creditors committee. Unsecured creditors were to be paid from the receipts on promissory notes made by Inc. to Construction and Excavating.

The funds trustees, who were the plaintiffs in the action in district court, were given notice of the proceedings in the Genesee County Circuit Court and attended hearings concerning the proposals of the initial arrangement and the subsequent reorganization, but did not participate in either of the plans approved by the state court under the authority of the Michigan Business Corporations Act.

Two years after the plan for reorganization was in operation and Inc. was a going enterprise, the trustees of the various funds started the action in

this case in the United States District Court for the Western District of Michigan seeking unpaid ERISA contributions, interest, penalties, liquidated damages and attorneys fees as provided under ERISA Section 1132 (g) (A), (B), (C), and (D). from Contruction, Excavating, Inc., husband and wife, Willaim H. Leoni and Joanne Leoni, who held the stock of Construction, Excavation and Inc., either directly or indirectly, and two other construction enterprises in which the Leoni's had an interest.

During the proceedings on the claims of the trustees of the several ERISA funds in the United States District Court for the Western District of Michigan, a Temporary Restraining Order was issued restraining any payment on the promissory notes that were to be used to make

payments to unsecured creditors of Construction and Excavating. This Temporary Restraining Order was vacated on August 29, 1985. The order vacating the Temporary Restraining Order expressly determined that the federal district court was not assuming jurisdiction of the reorganization plan in the state court, jurisdiction for which was determined to be in the Genesee County Circuit Court. A copy of this order is contained in the Appendix.

It was evident that the reorganization plan approved by the state court created Inc. to allow for a continuation of the business activity of Construction and Excavating to create assets to pay creditors and to accomplish this purpose it was necessary that Inc. have no responsibility for the debts of the reorganized corporations other

than through the plan. Thus, it was the contention of the defendants, in the district court and in the Court of Appeals, that Inc. could have no liability to the ERISA trust funds for the contributions owed to those funds by Construction and Excavating. The lower courts did not accept this contention based upon a legal conclusion that the provisions of Section 514 of ERISA; 29 U. S.C. 1114 (a), directed the preemption of the reorganization provisions of the Michigan Business Corporation Act and the determinations of the Genesee County Circuit Court made pursuant thereto. Because we believe such a conclusion is not within the contemplation of Section 514 as it has been applied by this and other courts, we bring this Petition for a Writ of Certiorari.

ARGUMENT

BECAUSE THERE IS NOTHING IN ERISA THAT GIVES UNSECURED CREDITORS OF CONTRIBUTORS TO ERISA BENEFIT PLANS A PREFERRED STATUS BECAUSE THE DEBT OWED IS FOR AN ERISA CONTRIBUTION, A DETERMINATION OF PREEMPTION OF STATE CORPORATE REORGANIZATION LAW BY ERISA IS NOT SOUND.

There have been numerous decisions of this Court which have dealt with the question of ERISA preemption of state law. In determining that ERISA did preempt Michigan corporate reorganization law as contained in the Michigan Business Corporations Act and applied by a state court, the Sixth Circuit Court of Appeals placed significant reliance upon the

recent decision of this Court,
Ingersol-Rand Co. v McClendon, ____ U. S.
____, 111 S. Ct. 476 (1990). We believe
that this reliance is misplaced.

There is no relationship which
creates a debt that does not
significantly concern the creditor with
the debtor's ability to pay. The
determination of the Court of Appeals,
933 F.2d at p 383, that a corporation in
state corporate reorganization would
affect the ERISA plans' ability to
measure the availability of funds and
calculate benefit levels, etc. is reason
to determine that preemption is required,
is not sound. Any factor which has
effect on ability to pay, has effect upon
the creditor's ability to plan and spend.
This does not make every generally
applicable state law dealing with the
debtor-creditor relationship preempted

because the relationship arises in connection with an ERISA plan.

In determining Ingersol-Rand, supra, at 111 S. Ct. 483, Justice O'Connor said:

Notwithstanding its breadth, we have recognized limits to ERISA's pre-emption clause. In Mackey v Lanier Collection Agency & Service, Inc., 486 U. S. 825, 108 S. Ct. 2182, 100 L.Ed.2d 836 (1988) the Court held that ERISA did not preempt a State's general garnishment statute even though it was applied to collect judgements against plan participants. Id., at 841, 108 S.Ct. at 2191. The fact that collection might burden the administration of a plan did not, by itself, compel pre-emption. Moreover, under the plain language

of § 514(a) the Court held that only state laws that relate to benefit plans are pre-empted. Fort Halifax Packing Co. v Coyne, 482 U. S. 1,23, 107 S.Ct. 2211,223-24, 96 L.Ed.2d 1 (1987). Thus, even though a state law required payment of severance benefits, which would normally fall within the purview of ERISA, it was not pre-empted because the statute did not require the establishment or maintenance of an ongoing plan. Id., at 12, at 107 S.Ct., at 2217-18.

Neither of these limitations is applicable to this case. We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. (Emphasis supplied) Nor is the cost of defending this lawsuit a mere administrative

burden. Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates, not merely to pension benefits, but to the essence of the pension plan itself.

Justice O'Connor, for the Court in Ingersoll-Rand, supra, at 111 S.Ct. 482, and previously in FMC Corporation v Holliday, ____ U. S. ____, 111 S.Ct. 403, 407, relates that basic to the resolution of a preemption question is the intent of Congress. We submit that it cannot be said with conviction that by enacting ERISA, Congress intended to preempt generally applicable state laws of corporate reorganization dealing with aiding a debtor corporation's ability to meet its obligations.

There are decisions in addition to the ones identified in the Ingersol-Rand opinion, supra, which do not support the preemption determination, here. By way of example, and with no attempt at being exhaustive, we point to two state court of last resort cases that determined that generally applicable statutes dealing with the debtor-creditor relationship were not preempted by ERISA. These cases are Goben v Barry, 703 P2d 1378 (Kan 1985) and Planned Consumers Marketing v Coats and Clark, 522 NE2d 30 (Ct of App. NY 1988). Of similar connotation is Deiches v Carpenters' Health and Welfare Fund, 572 F Supp 766 (D. NJ 1983).

Lastly, we wish to challenge the determination of the Sixth Circuit Court of Appeals regarding preemption as it relates to the provisions of ERISA contained in 29 U. S. C. 1144(b)(2)(A)

that preemption is forbidden because the law sought to be preempted deals with "securities."

Our contention was dismissed by the Sixth Circuit Court of Appeals by reasoning that "securities" in the cited provision concerned only the marketing of securities, 933 F.2d at pp 383-384. While we believe that giving a narrow scope to a broad statutory definition is questionable, assuming the scope of the definition used by the Court of Appeals to be appropriate; examination of the provisions of Section 862 of the Michigan Business Corporations Act; MCLA 450.1862 shows that these provisions do deal with the marketing of securities within the purposes of a corporate reorganization.

RELIEF

WHEREFORE, Petitioner prays that a Writ of Certiorari directed to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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Nos. 89 1411/1412
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: MICHIGAN CARPENTERS
COUNCIL HEALTH AND WELFARE
FUND, et al.,

Plaintiffs,

TRUSTEES FOR MICHIGAN
CARPENTERS COUNCIL HEALTH
AND WELFARE FUND,

Plaintiff-Appellee,
Cross-Appellant (89-1412)

v

C.J. ROGERS, INC., a
Michigan Corporation, et al.,
Defendants,

CHARLES J. ROGERS
CONSTRUCTION, a Michigan
Corporation,
Defendant-Appellant,
Cross-Appellee (89-1411).

ON APPEAL from the
United States District
Court for the Western
District of Michigan

Decided and Filed May 10, 1991

Before: KENNEDY, BOGGS and SUHRHEINRICH,
Circuit Judges.

SUHRHEINRICH, Circuit Judge. This case involves an appeal and cross-appeal from a final judgment that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, preempted state corporate reorganization law and that various defendants were liable to the plaintiffs below on an "alter ego" theory of liability for contributions owed to the plaintiff trust funds. For the reasons stated below, we AFFIRM in part and with respect to the district court's finding as to liquidated damages, VACATE and REMAND in part.

I.

FACTS

Plaintiffs are ten voluntary
unincorporated trust funds established

pursuant to Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, and ERISA. The funds provide health, retirement, and education benefits for employee beneficiaries of the defendant corporations. Plaintiffs brought this action to collect \$500,000 in alleged arrearages and penalties, and to compel defendants to keep current on their contributions, under collective bargaining agreements which obligated defendants to make periodic contributions for the benefit of their employees. Defendants, who are or were all generally in the construction business, included Charles J. Rogers Construction Company ("Construction"), C.J. Rogers, Inc. ("Inc."), Chas. J. Rogers Excavating, Inc. ("Excavating"), and W.P.M., Inc., all corporations organized under Michigan law; C.J. Rogers-Cooper, a joint venture which operated in Michigan in the mid-1970's; and William H. Leoni, a building

contractor who is the president of Inc., Construction, and Excavating; and is also the sole shareholder of LERO Corporation, a holding corporation which owns a majority of the shares of stock of Construction and Excavating.

Both Excavating and Construction were incorporated by Charles J. Rogers as small, family-owned and operated corporations. Before 1975, controlling interests in Excavating were held by Charles J. Roger's two sons, Charles K. Rogers and Lawrence P. Rogers, although other family members held lesser amounts of stock. William H. Leoni had been an employee of Construction since 1952, and until 1975, held a small block of stock in Excavating.¹

¹William H. Leoni Sr. is the son-in-law of Charles J. Rogers.

In 1974, Excavating found itself in financial straits and without operating funds. Charles K. and Lawrence P. each agreed to loan Excavating \$100,000 in return for promissory notes with face values of the same amount and secured by Excavating's accounts receivable. In addition, Leoni assumed the role of active manager. Difficulties continued and Leoni agreed to buy out the positions of the other shareholders in both Construction and Excavating. It was at this time that LERO Industries, Inc. was incorporated to be a holding company for the stock of the two Rogers' companies. According to the terms of the agreement executed on May 20, 1975, Excavating and Construction agreed to redeem all outstanding shares of their stock for \$646,000, and Leoni personally guaranteed the companies' obligations. The agreement further provided that at the closing of the deal, the debts to Charles K. and Lawrence

P. would be discharged by payment to them of \$50,000 each.

Leoni became president of both companies upon the sale and his wife, Joanne, became the owner of 100% of Construction's stock and 98% of Excavating's stock. At this time, Joanne and William Leoni paid the Rogers brothers \$50,000 each for the promissory notes pursuant to the terms of the May 20, 1975 contract. Although the agreement itself stated that the notes would be discharged at the time of the closing, the notes were actually assigned to the Leonis, and remained outstanding debts of Excavating. The promissory notes had been, and continued to be, secured by Excavating's accounts receivable.

The companies' financial difficulties continued, leading them to petition the Genesee County Circuit Court in Flint, Michigan, in July of 1979 for an arrangement of unsecured creditors pursuant to the

Michigan Business Corporations Act, Mich. Comp. Laws §§ 450.1101-450.2098 ("the Michigan Act"). Under Michigan law, if a three-fourths majority of creditors in value agree to a compromise, and receive the sanction of the court to which application was made, the compromise is binding on all creditors of the corporation. Mich. Comp. Laws § 450.1204. At that time, the state judge enjoined all creditors of Construction and Excavating from filing any suit against the companies to collect debts owed and from enforcing any lien against the defendant companies. Among the numerous unsecured obligations that had become delinquent were contributions owed by defendants to plaintiffs pursuant to collective bargaining agreements between defendants and plaintiff funds.

The plan of arrangement filed with the circuit court proposed to pay off the general unsecured creditors over varying

periods of time, with a 100% payoff to be made to electing creditors over ten years. In accordance with the state court's order, the two companies notified all of their creditors, both secured and unsecured, of the reorganization and submitted a list of these creditors to the court. The initial plan of arrangement submitted jointly by excavating and construction was approved by the required three-fourths majority of the unsecured creditors, and by the state court on March 22, 1980. Plaintiffs received notice of the plan but did not participate in the arrangement.

Construction and Excavating were unable to perform the planned compromise and arrangement. A second plan was then proposed in the state court in which the assets of the two companies would be transferred to a new Michigan corporation, C.J. Rogers, Inc. ("Inc."). This new plan was approved by the required three-fourths

majority of the unsecured creditors and by the state court. Inc. was incorporated on May 1, 1980. Once again, plaintiffs received notice of the second proposed plan, but did not participate in the arrangement.

Inc. was capitalized in the following manner. Both Excavating and Construction sold all of their corporate assets and assigned the accounts receivable, inventory, and uncompleted contracts to Inc. Inc. purchased these assets at their fair market value in consideration for two ten-year secured promissory notes given by Inc. to Excavating and Construction. Construction and Excavating were issued \$1 million of preferred stock with an indefinite redemption period as payment for the accounts receivable and inventory. In addition, Joanne Leoni executed a subscription agreement to purchase 200,000 shares of common stock of Inc. for either cash or property. In return, she assigned

to Inc. the two promissory notes that she held as assignee of the Rogers brothers. Each of the notes, as previously stated, had a face value of \$100,000 and were secured by certain accounts receivable of Excavating. Mrs. Leoni became the sole shareholder of Inc.

Inc. called for payment of the subscription agreement on October 14, 1980, the date upon which the circuit court and majority of the new creditors approved the sale of assets to Inc. By this time, the accounts receivable securing the two promissory notes had been paid, thereby fulfilling the precondition to Inc.'s creation. The new plan was approved by a majority of the new creditors and the state court.

In May 1983, the plaintiffs filed this action in federal district court seeing unpaid contributions and injunctive relief pursuant to collective bargaining agreements

with Construction and Excavating and from Inc. and Leoni as alter-egos of these two companies. On November 20, 1985, the district court rendered its findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a), finding that: (1) defendants were liable to plaintiffs for unpaid contributions, interest, liquidated damages, and attorney fees under 29 U.S.C. § 1132(g)(2)(A), (B), (C) and (D); (2) Inc. was the alter-ego of Construction and Excavating; (3) defendant Leoni was not personally liable for the unpaid contributions; and (4) plaintiffs' liquidated damages claims could not exceed the 20% statutory limit of the delinquent contributions of defendants, and that it was irrelevant what type of assessments -- penalty or audit -- plaintiffs could have levied against defendants. A final judgment was entered in favor of plaintiffs for unpaid contributions in the amount of

\$100,904.68, interest in the amount of \$96,643.56, liquidated damages in an amount equal to the interest, together with attorney fees, costs, and post judgment interest. The district court denied the defendants' motion to alter or amend the judgment on February 22, 1989.

On appeal, the defendants assert that the district court erred in holding that Inc. is liable under an alter-ego theory of liability; in applying ERISA rather than state reorganization provisions; and in refusing to offer equitable relief under 29 U.S.C. § 1132 (g)(2)(E). On cross-appeal the plaintiffs allege error in the district court's refusal to find defendant Leoni personally liable. The plaintiffs further allege that the district court erred in holding that the liquidated damages available under 20 U.S.C. § 1132 (g) cannot exceed 20% of the total delinquent contributions owed by the defendants. It is

also contended that the 20% referred to in this section deals with an annualized figure rather than a flat 20% of the amount of contributions due and owing regardless of the period that has elapsed between the time they were due and the ultimate judgment entered in the case.

II.

APPELLATE JURISDICTION

An initial matter is the extent to which we may entertain jurisdiction over the appeal and cross-appeal, given that both the notices of appeal in this case merely employ the term "et al." to designate the respective appealing parties. Rule 3(c) of the Federal Rules of Appellate Procedure provides in pertinent part that "[t]he notice of appeal shall specify the party or parties taking the appeal," and further provides that "[a]n appeal shall not be

dismissed for informality of form or title of the notice of appeal." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Supreme Court held that use of the term "et al." to designate parties to an appeal fails to comply with the specificity requirement of Rule 3(c), and that this failure creates a jurisdictional bar: "[t]he failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." 487 U.S. at 314. In *Minority Employees v. Tennessee Dep't of Employment Sec.*, 901 F.2d 1327 (6th Cir.), cert. denied, 111 S. Ct. 210 (1990), we held that, because the failure to specify a party is a jurisdictional defect, we were required to apply the decision in *Torres* retroactively. *Id.*

The defendants filed their notice of appeal on March 20, 1989, The relevant portion of the caption reads as follows:

"MICHIGAN CARPENTERS COUNCIL HEALTH & WELFARE FUND, et al., Plaintiffs, v. et al., Defendants." The body of the notice states as follows: "Notice is hereby given that Defendants, Charles J. Rogers Construction Company, et al., in the above case no. G83-582 CA5, hereby appeal to the United States Court of Appeals for the Sixth Circuit...." Under *Torres and Minority Employees*, it is clear that the only defendant properly before us in this appeal is Charles J. Rogers Construction Company ("Construction") since it is the only party designated in the caption and body of the notice of appeal.

The notice of cross-appeal, which is governed by Rule 4(a)(3) of the Federal Rules of Appellate Procedure, is similarly defective. In the notice of cross-appeal, the caption appears as follows: "TRUSTEES FOR MICHIGAN CARPENTERS' COUNCIL HEALTH AND WELFARE FUND, et al [sic], Plaintiffs, v.

CHARLES J. ROGERS CONSTRUCTION CO., et al [sic], Defendants;" and the body of the notice states that "Notice is hereby given that plaintiff TRUSTEES FOR MICHIGAN CARPENTERS COUNCIL HEALTH, [sic] et al, hereby cross-appeals....² Under a *Torres* and *Minority Employees* analysis, the notice fails to meet the specificity requirement of Rule 3(c), and therefore "constitutes a failure of that party to appeal." While it could be argued that the specificity requirement of Fed. R. App. P. 3(c) applies only to the *initial* notice of appeal, we conclude that the broad language of *Torres* also encompasses Rule 4(a)(3). See *Young Radiator Co. v. Celotex Corp.*, 881 2 F.2d 1408, 1416 (7th Cir. 1989) (noting that

²The original notice of cross-appeal erroneously stated that "Defendant CHARLES J. ROGERS CONSTRUCTION COMPANY, INC., et al [sic]," was the party cross-appealing to this court. The record reveals the counsel for plaintiffs corrected that error on April 3, 1989, within the jurisdictional time limits. See Fed. R. App. P. 4(a)(3).

the Torres opinion made clear that the requirements of both Rules 3 and 4 must be satisfied as to each party); *Stockstill v. Petty Ray Geophysical*, 888 F.2d 1493, 1496 (5th Cir. 1989) (same). Our jurisdiction over the cross-appeal is therefore restricted to the only named party, the Michigan Carpenters Council Health and Welfare Fund.

Having determined that the defendant Construction is the only party properly before us on the appeal, we further find that all issues on appeal are preserved with the exception of the claim that the district court erred in finding that Inc. was the alter ego of Construction and Excavating since Inc. failed to perfect its right to appeal. However, our holders are subject to the restriction that the outcome affects only Construction. On cross-appeal, all issues raised are preserved, once again with the condition that our findings are

applicable only to the Michigan Carpenters Council Health and Welfare Fund (hereinafter "Michigan Carpenters" or "the Fund").

III.

THE APPEAL

Construction's first argument on appeal is that the district court erred in holding that ERISA preempted Michigan's state corporate reorganization laws. ERISA is a comprehensive statutory framework which governs the administration of private employee pension and benefit plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). Section 514 of ERISA explicitly preempts state law, providing in pertinent part that "the provisions of this subchapter...shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1444(a). State laws are defined to include "all laws, decisions, rules, regulations, or

other State action having the effect of law...." 29 U.S.C. § 1144(c)(1). The preemption provision is designed to "'provide for a uniform source of law,'" *Whitworth Bros. Storage Co. v. Central States*, 794 F.2d 221, 233 (6th Cir.) (quoting H.R. Rep. No. 93-533, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4655), cert. denied, 479 U.S. 1007 (1986), and is "'intended to apply in its broadest sense to all actions of State or local governments,' and to 'reserv[e] to Federal authority the sole power to regulate the field of employee benefit plans.'" *Kentucky Laborers District Council Health and Welfare Fund v. Hope*, 861 F.2d 1003, 1004 (6th Cir. 1988) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983)).

In *Shaw* the Supreme Court held that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a

plan." *Shaw* 463 U.S. at 96-97 (footnote omitted). Thus, not only are "state laws specifically designed to affect employee benefit plans," preempted, *Shaw* 463 U.S. at 98; but also any law that has any "connection with or reference to" the plan. *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 47 (1987). See also *Hope*, 861 F. 2d at 1004. The Supreme Court recently reaffirmed this principle in *Ingersoll-Rand v. McClendon*, ___ U.S. ___, 111 S. Ct. 478 (1990), and *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S. Ct. 403 (1990) (preemption clause is conspicuous for its breadth). See also *Mackey v. Lanier*, 486 U.S. 825, 829-30 (1988). Notwithstanding, the Supreme Court has indicated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21; *Ingersoll-Rand*, ___ U.S. at ___, 11 S. Ct. at 483.

See, e.g., *Mackey, supra* (ERISA did not preempt a state's general garnishment statute); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (severance pay statute not preempted); *Aetna Life Ins. Co. v. Borges*, 869 F. 2d 142 (2d Cir.) (state escheat law not preempted), cert. denied, 110 S. Ct. 57 (1989); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987) (municipal income tax not preempted).

Under Michigan law, a corporation may include in its articles of incorporation a provision which allows the corporation or a creditor or shareholder thereof, upon proposal that a compromise or arrangement plan of reorganization be effectuated between any of the parties, to apply to a court of equity jurisdiction within the state to order a meeting of the creditors or class of creditors, or shareholders or class of shareholders to be affected by the proposed compromise or reorganization.

Mich. Comp. Laws § 450.1204. The statute further provides that:

If a majority in number representing 3/4 in value of the creditors ... to be affected by the proposed compromise or arrangement or a reorganization, agree to a compromise, or arrangement or a reorganization of this corporation as a consequence of the compromise or arrangement, ... if sanctioned by the court ... shall be binding on all the creditors or class of creditors ... and also on this corporation. *Id.*

Section 205 states that when the provision of Section 204 (Mich. Comp. Laws § 450.1204) is included in the original articles of incorporation or added by amendment, all persons who become creditors or shareholders thereof are bound by the provision. Mich.

Comp. Laws § 450.1205. Once a plan of reorganization has been confirmed by the judgment of a court of competent jurisdiction, Section 861 of the Michigan Act authorizes the manner in which the plan or reorganization may be carried out. It states that such action by the corporation "may be taken, as directed in the judgment, by the receiver or trustee of the corporation appointed in the reorganization proceedings, or by any other person designated by the court." Mich. Comp. Laws § 450.1861. Finally, Section 862 creates and defines the powers of corporation under the judicially confirmed plan of reorganization. Mich. Comp. Laws § 450.1862.

A.

1.

It is Construction's contention that the state corporate reorganization laws are not preempted by ERISA because they are not

inconsistent with any specific ERISA provisions and therefore do not defeat ERISA's purpose of providing for the uniform administration of employee benefit plans. Specifically, Construction argues that because ERISA is silent as to debtor-creditor relationships when a plan is solvent, it does not hinder the uniform application of an administrative scheme such as a state court reorganization plan.

In support of its argument, Construction points out that ERISA contains specific legislation to regulate employer withdrawals from multiemployer pension plans. See Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 20 U.S.C. § 1381. Thus, from apparent congressional silence on the issue of debtor-creditor relations when the parties are solvent, Construction asks us to infer that such state regulation is permissible. This argument draws its force

from *Mackey, supra*, where the Supreme Court held that a generally applicable state garnishment law allowing creditors to garnish ERISA welfare benefits was not preempted. Noting that only pension funds were protected from garnishment, the Court held that it could be inferred from congressional silence that the legislature did not intend to extend a similar protection for welfare benefits. *Id.*

We do not find the instant situation analogous to *Mackey*. Construction's argument ignores the explicit language of section 515 of ERISA, which provides that every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or collective bargaining agreement, "shall to the extent not inconsistent with law, make such contributions *in accordance with the terms and conditions of such plan or such agreement.*" 29 U.S.C. § 1145 (emphasis added). Further,

pursuant to section 502(g), 29 U.S.C. § 1132(g), a trustee of a plan may bring an action in federal district court to enforce those obligations. The requirement of § 515 is mandatory and unconditional. We therefore find that the Michigan Act conflicts directly with the provision to the extent it allows an employer unilaterally to alter its obligation to the plan in contravention of the contractually agreed-upon terms. Nor does the fact that MPPAA regulates employer withdrawals from multiemployer plans advance Construction's argument. To the extent Congress wished to allow an employer to alter his obligations to a plan it enacted the MPPA, which provides a comprehensive statutory scheme regulating employer withdrawals from multiemployer plans.³ We do not believe

³The MPPAA protects multiemployer plans by requiring withdrawing employers to pay the multiemployer fund a proportional share of the fund's "unfunded vested liability,"

that an employer can avoid these stringent requirements through mechanisms created by state law.

Nor are we persuaded by Construction's citation to *Fort Packing, supra*, (Maine statute requiring a one-time severance payment to employees in the event of plant closings not preempted because it neither established nor required an employer to maintain an employee welfare benefit plan, and involved little more than a conditional one time obligation of writing a lump sum check); *Borges, supra*, (application of Connecticut's escheat law to ERISA covered benefit checks and drafts that had been issued but not collected not preempted because state law had no effect on insurance company's original determination of eligibility for benefits and economic and

29 U.S.C. § 1381. The fund's trustees have initial responsibility of determining all employee's allocable share of the unfunded vested benefit liability and to collect the amounts due. 29 U.S.C. § 1382.

administrative effect was therefore not substantial enough to warrant preemption); or *Deiches v. Carpenters' Health & Welfare Fund of Philadelphia*, 572 F Supp. 766 (D.N.J. 1983) (New Jersey preference statute which allowed a receiver of an insolvent employer to avoid a preferential transfer of delinquent contributions owed to a welfare trust fund not preempted by ERISA since statute merely required return of certain employer's contributions to a plan and did not have any effect upon the rules, procedures or policies of the ERISA plan). Unlike those cases, each of which found that the effect of state laws on ERISA plans was too tenuous or remote to warrant preemption, we conclude that the application of the Michigan Act to the Fund would have a substantial ongoing effect on the administration of the employee benefit plan affected by such an arrangement. Rather than having the amount

of contributions owed by the employer determined by the plan's trustee in accordance with the parties' agreements and applicable federal law, the state provisions in essence shift those decisions to the administrator of the corporate compromise or reorganization. The amount of contributions received would therefore be subject to the presumable precarious financial condition of the reorganized corporation; and necessarily affect the plan's ability to calculate benefit levels, make disbursements, and monitor the availability of funds for benefit payments. See *Fort Halifax Packing, supra*, 482 U.S. at 9. Thus, we conclude that the district court did not err in treating the Michigan Act as preempted by ERISA.

2.

In the alternative, Construction argues that the Michigan Act falls within an

exception to ERISA preemption under the "savings" clause, 29 U.S.C. § 1144(b)(2)(A), which provides:

Except as provided in subparagraph (B),⁴ nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

Construction contends that because a reorganization or compromise effectuated pursuant to the Michigan reorganization provisions affects the rights of shareholders, noteholders, and holders of other debt instruments, all of which are classified as securities, the provisions "regulate ... securities." In support, Construction cites the definitional section of ERISA, which incorporates the definition

⁴29 U.S.C. § 1144 (b)(2)(B), the "deemer" clause, is not relevant to the instant appeal.

of "security" found in 15 U.S.C. § 77(b)(1) of the Federal Securities Act of 1933.

Construction's argument is without merit. Undisputedly, the provisions of the Michigan Act "relate to" and "affect" securities since the Michigan Act applies to corporations, which are financed by "securities" as broadly defined. Thus, any statutory provision which redefines a creditor's right in a corporation necessarily has an impact upon "securities." That is not to say, however, that the Michigan Act was designed to "regulate securities." To the contrary, the express purposes of the Michigan Act are to simplify and modernize the law governing business corporations; provide a general corporate form for the conduct or promotion of a lawful business; and to give special recognition to the legitimate needs of close corporations. Mich. Comp. Laws § 450.1103. Moreover, Michigan has adopted the Michigan

Uniform Securities Act, which became effective January 1, 1985.⁵ This legislation "is designed to protect the public against fraud and deception in the issuance, sale, exchange, or disposition of securities within the State of Michigan by requiring the registration of certain securities and transactions." *People v. Dempster*, 396 Mich. 700, 704 (1976) (quoting Schmidt & Cavitch, MICHIGAN CORPORATION LAW, 1071 (1974)). Thus it is clear that the Michigan Act does not "regulate securities" within the meaning of the savings clause.

B.

Construction's second argument on appeal is that the district court erred in refusing

⁵The Michigan Uniform Securities Act replaced the 40-year old Michigan Blue Sky Law, 1933 PA 205. The Michigan Act substantially tracks the language of the Uniform Securities Act. *People v. Dempster*, 396 Mich. 700, 704 (1976).

to grant it "other equitable relief" pursuant to 29 U.S.C. § 1132(g)(2)(E). The section provides in pertinent part that in any action brought by a fiduciary on behalf of a plan to enforce section 1145, the court shall award the plan "such other legal or equitable relief as the court deems appropriate." 29 U.S.C. § 1132(g)(2)(E). Specifically, Construction argues that the district court failed to give appropriate equitable relief by refusing to assume jurisdiction over the state reorganization plan, and by awarding the plaintiff funds full return of their claim of unpaid contributions, interest, liquidated damages, costs and attorney fees; a recovery four to five times greater than other unsecured creditors of Construction and Excavating will receive on their claims. First, it is clear from the unequivocal language of section 1132(g)(2)(E) that equitable relief is discretionary. To paraphrase the

section, the district court is not required to grant equitable relief unless and until it deems equitable relief appropriate. Second, given our disposition of the preemption issue on appeal, and the liquidated damages issue on cross-appeal, we conclude that the district court did not err in denying equitable relief.

IV.

THE CROSS APPEAL

A.

On cross-appeal, Michigan Carpenters argues that the district court erred in refusing to "pierce the corporate veil" to find defendant William Leoni personally liable for the willful signing of collective bargaining agreements on behalf of inactive company assets from Construction and Excavating to Mrs. Leoni for capitalization of Inc.

A corporation is presumed to be a separate entity from its shareholders. *Laborers' Pension Trust Fund v. Sydney Weinberger Homes*, 872 F. 2d 702, 704 (6th Cir. 1988) (citing *Contractors Laborers, Teamsters & Engineers Health and Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985)). The corporate veil may be pierced, however, if the court finds "substantial reasons for

doing so'" after weighing the following factors: "(1) the amount of respect given to the separate entity of the corporation by its shareholders; (2) the degree of injustice visited on the litigants by recognition of the corporate entity; and (3) the fraudulent intent of the incorporators." *Weinberger Homes*, 872 F.2d at 704 (citation omitted).⁶ This court has also noted that "deference to the corporate form may be particularly inappropriate in relation to ERISA because Congress enacted ERISA in part to protect employees who were being deprived of anticipated benefits by a corporate sham." *Weinberger Homes*, 872 F.2d at 705

⁶In *Weinberger Homes*, the court provided a nonexhaustive list of specific factors including undercapitalization of the corporation, the maintenance of separate books, the separation of corporate and individual finances, the use of the corporate formalities and finally, whether the corporation is a sham. 872 F.2d at 704-05 (citation omitted). See also *N.L.R. B. v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 380 n. 13 (1990).

(citing *Alman v. Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986)).

On appeal, we review the district court's findings of fact under a clearly erroneous standard of review. Fed. R. Civ. P. 52; *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* at 573-74. When findings of fact are based upon assessments of witness credibility, "even greater deference" to the finder of fact is warranted, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575.

In support of its claim, Michigan Carpenters contends first that on several occasions defendant Leoni intentionally signed the wrong corporate entity to a collective bargaining agreement. The plaintiff claims that in November 1980, Leoni signed collective bargaining agreements under the names of the old companies. Excavating and Construction, with full knowledge that these companies had been inactive since May 1980. It is further alleged that on February 6, 1981, Leoni personally signed the collective bargaining agreement for defendant Excavating when he knew the company was not in business. Michigan Carpenters also alleges that Leoni clearly testified that his purpose was to gain "an advantage for the company," which the plaintiff argues was that the company would later claim that no such agreement existed and therefore no fringe benefits were owed.

At trial, Leoni testified that the union's business manager, Gerald R. Hall, requested him to sign the agreement for "Rogers, Inc.", and that he did so with full knowledge that the company was dormant and not actively in business. It was Leoni's position that this contract executed on behalf of Excavating, should not bind Inc. Hall, on the other hand, testified that he had asked Leoni to sign on behalf of the "new Rogers company." The district court noted that if Hall's testimony were fully credited, it tended to show that Leoni knowingly attempted to deceive Hall by signing for a company which Leoni knew was not active. The court observed, however, that Hall later testified that he believed Leoni to be a man of his word and did not believe Leoni set up Inc. to evade his fringe obligations. In addition, Hall testified that he knew a new Rogers company had been formed and that he believed "Chas.

J. Rogers Inc." was the name of the new company, but that he never asked, nor did Leoni inform him of the new company's name. Hall also stated that he had seen paychecks with the names "Chas. J. Rogers Inc." and "C.J. Rogers Inc." during the period of April to September 1980. Furthermore, Hall testified that it would have been reasonable for Leoni to assume that he, Hall, knew as of February 1981, that C. J. Rogers, Inc. was the name of the new company.

On the basis of this testimony, the district court held that the plaintiffs below failed to show that Leoni acted with specific intent to deceive Hall. The court found that despite the plaintiffs' emphasis on Leoni's willingness to take advantage of Hall's ignorance of the new company's name in order to avoid creating contractual obligations for the new Inc., Hall himself conceded the adversarial nature of employer-union relationships. The court also stated

in light of the confusion which attended Inc.'s creation, it was not surprising that Hall might have been confused as to the name of the new corporation, and that he might very well have asked Leoni to sign for Excavating, although intending to sign up Inc. The court further held that it was not implausible that Leoni sincerely believed Hall to be requesting a contract with Excavating, as various witnesses testified that, although dormant, the two old companies could indeed recommence active operations. Thus, the court was unwilling to find fraud from "what may be characterized as sharp business practices, especially where there may have been some negligence on the part of Hall in not knowing the correct name of the entity with which he was trying to secure a contract." Upon review of the record, we find that the district court's findings of fact are supported by the record as a whole, and are

not clearly erroneous. Moreover, we are especially hesitant to set aside the district court's findings when they are based on credibility determinations of the witnesses. *Anderson, supra*, 470 U.S. at 575.

Next, Michigan Carpenters asserts that Leoni testified falsely before the state court judge that he was the sole shareholder of Excavating and Construction, since he owned slightly less than 100% of the shares of each company. With respect to this allegation, the district court noted also that witness Rene Ortlieb, the attorney who represented Construction, Excavating and Inc. during the state court reorganization, in his statements to the state court judge, also referred to Leoni as the "sole shareholder." The district court found that this was not a material misrepresentation, since the state court judge was attempting to elicit from Leoni concurrence in the

representations made that day by Ortlieb, the majority of which concerned other details of the reorganization. We find no basis in the record to disturb that finding.

Michigan Carpenters' third contention is that during the reorganization, the defendants obtained a restraining order preventing all creditors from collecting obligations owed by the various defendants, and that while that order was in effect, defendant Leoni, according to his own testimony, paid over to Inc. for the benefit of Mrs. Leoni approximately \$200,000 from the accounts receivable of the old companies, which she now claims is her capital contribution to Inc. The Fund contends that not only did Mrs. Leoni not file a claim with the state court, she was not even listed as a creditor. It argues that defendant Leoni's own exhibit reflects that the note was canceled at the real estate closing in 1975. In addition,

Michigan Carpenters asserts that even if Mrs. Leoni did receive the note, it was unenforceable and therefore invalid consideration for the new stock, since at the time it was paid in September 1980 it was not enforceable under the applicable statute of limitations. Finally, the Fund points out that the note in question had been carried on the corporate books as a "note payable-officer", and that Mrs. Leoni was never an officer, and that the note was payable to husband and wife.

We find no support in the record for the Fund's argument. The initial order signed by the state court judge enjoined all creditors from enforcing their debts "until further order of the Court." There was testimony at trial that the restraining order was issued in part to allow the companies to work out a plan of arrangement. The state court approved the proposal to create Inc. at a hearing held on October 14,

1980, based on representations by Ortlieb that all creditors had been apprised of the proposal and that most had approved. The district court specifically found that the Oversight Committee's recommendation to the state court judge to approve the sale of assets was based on full knowledge of the transaction by which the notes were assigned. The court based this conclusion on testimony elicited from the accountant who prepared the financial statements of the two companies during the pertinent time period, the attorney who was responsible for the mechanics of Inc.'s incorporation and the attorney for the Oversight Committee. With regard to the plaintiff's contention that these notes were surreptitiously diverted to Inc. without the knowledge or consent of the creditors or the state court, the district court found, and we agree, that:

[T]he evidence simply does not support

that claim; if anything, the evidence solidly supports the finding that the transaction was scrupulously monitored by the creditors of the two companies and that their financial affairs were laid naked to all who had an interest in them. It simply strains credibility to find that the attorneys, accountants, and the large creditors, were unaware of the transaction, or, which must be plaintiffs' theory, that they somehow conspired to divert the notes to the Leonis' benefit.

Further, testimony at trial indicated that the notation "note payable--officer" was made as an accounting convention. As correctly noted by the district court, the fact that the statute of limitations had run on the two demand notes did not erase the debt but merely prevented the creditor from enforcing his rights. See A. Corbin, CORBIN

ON CONTRACTS § 8 (1963) (stating that a perfectly valid contract may become unenforceable by virtue of the statute of limitations but that the expiration of the period fixed by the statute does not make such a contract void but merely unenforceable).

Finally, the district court also found as to Inc. that the evidence showed that it was adequately capitalized. In reaching this conclusion the court relied on the testimony of a corporate law expert that the \$200,000 invested by Mrs. Leoni was sufficient capitalization for Inc., since it allowed the company to obtain minimal bonding. Further, the district court stated that the \$200,000 investment plus Inc.'s deferred-free credit rating enabled it to prequalify for \$20 million dollars worth of state work. The plaintiffs offered no rebuttal testimony. In light of the foregoing, we find no basis for reversing the district

court's decision with respect to defendant Leoni.

B.

Michigan Carpenters' second issue on cross-appeal pertains to the district court's ruling on liquidated damages. Plaintiffs argued below that unpaid contributions in the amount of \$187,363.73 and liquidated damages representing both late payments and audit assessments in the amount of \$284,594.00 were due and owing. The district court noted that the liquidated damages requested by the plaintiffs would amount to roughly 150% of the unpaid contributions. It ruled that such an amount was in excess of that permitted by 29 U.S.C. § 1132(g), since liquidated damages may not exceed 20% of unpaid contributions. The district court also held that it was irrelevant what type of assessment - late payment or audit - plaintiffs might have

levied against the defendants, because the effect was still the same.

In its findings of fact and conclusions of law the district court did not determine exactly how much was owed by whom, which particular contracts were binding upon which company, or make findings regarding whether in some instances the contributions had in fact been paid. Instead, the court simply asked the parties to submit itemized statements of damages, interest, and liquidated damages pursuant to the court's rulings and 29 U.S.C. § 1132(g)(2). After adjustments not relevant to the instant appeal. the court awarded unpaid contributions in the amount of \$100,904.68, prejudgment interest on the unpaid contributions in the amount of \$96,643.56, and an amount equal to the interest as liquidated damages.

On cross-appeal Michigan Carpenters argues that the late payment assessments requested

are for contributions that were voluntarily, but untimely, made by the defendants. Thus, the underlying contributions against which the late payments are assessed are allegedly not a part of the court's "unpaid contribution" figure. Likewise, Michigan Carpenters asserts that the audit assessments are also based on contributions that in some instances have already been made. Michigan Carpenters therefore claims that its right to collect these amounts is independent of its right to collect liquidated damages on the unpaid contributions mandated by 29 U.S.C. § 1132(g)(2)(C).⁷

Michigan Carpenters' allegations require us to determine whether the Fund is entitled to liquidated damages in the form of audit or late payment assessments - in addition to those authorized by section 1132(g). Before

⁷In the complaint, the plaintiffs sought separate relief under ERISA and the various collective bargaining agreements.

we can determine whether the Fund is entitled to contributions outside of section 1132(g), we must analyze the scope of the term "unpaid contributions" as it is found in that section. Statutory interpretation is a question of law subject to a *de novo* review by this court. *In re Vause* 886 F.2d 794, 798 (6th Cir. 1989). In construing the statute, we must attempt to "ascertain the intent of Congress." *Id.* (citation omitted).

Section 502 and 515 of ERISA, 29 U.S.C. §§ 1132 and 1145, as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"). Pub. L. No. 96-364, 94 Stat. 1208 (codified in scattered sections of 5, 26, & 29 U.S.C.) of 1980, §§ 1132(g) and 1145, govern the enforcement of employer contributions to employee pension and welfare trust funds. These sections provide a statutory remedy for a trust fund fiduciary suing to collect unpaid plan

contributions and are designed to "promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies."

Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co., 522 F. Supp. 919, 928 (E.D. Mich. 1981) (quoting Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1976, *The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration* (Comm. Print. 1980) at 43-44).

Section 515 provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of

such plan or such agreement.

29 U.S.C. § 1145. Section 515 is reinforced by the remedial provisions of ERISA section 502(g):

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan-

(A) *the unpaid contributions,*

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be

permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C. § 1132(g) (2) (emphasis added).

The language of Section 1132(g) is mandatory, and once the provision applies, the district court must award liquidated damages. See, e.g., *Idaho Plumbers & Pipefitters v. United Mechanical Contractors, Inc.*, 875 F.2d 212, 215 (9th Cir. 1989); *Central States, Southeast and Southwest*

Areas Pension Fund v. Gerber Truck Serv., Inc., 870 F.2d 1148, 1156 (7th Cir. 1989); *Amalgamated Ins. Fund v. Sheldon Hall Clothing*, 862 F.2d 1020, 1023 (3rd Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989); *Penn Elastic Co. v. United Retail & Wholesale Corp.*, 792 F.2d 45, 47 (3rd Cir. 1986). The section provides that upon "a judgment in favor of the plan" the court shall award the plan the unpaid contributions" and "interest on the unpaid contributions." 29 U.S.C. § 1132(g) (2)(A) & (B). Thus, it is clear that the provisions of that section apply only if there were unpaid contributions on the date of the award. In reaching this conclusion we reject the decisions of those courts which state, often in dicta, that the provisions of section 1132(g)(2) apply at the time suit is filed. See, *Idaho Plumbers & Pipefitters*, 875 F.2d at 215; *Carpenters & Joiners Welfare Fund v. Gittleman Corp.*, 875 F.2d 476, 478 (8th Cir. 1988); *Carpenters Health and Welfare Fund of Philadelphia and*

Vicinity v. Building Tech. Inc., 747 F. Supp. 288 (E.D. Pa. 1990); *Bennett v. Machined Metals Co.*, 591 F. Supp. 600, 605-06 (E.D. Pa. 1984); *Trustees of the Glaziers Local 963 Pension, Welfare and Apprenticeship Funds v. Walker and Laberge Co., Inc.*, 619 F. Supp. 1402, 1405 (D.C. Md. 1985). See also *Carpenters Amended and Restated Health Benefit Fund v. John Ryan Construction Co.*, 767 F.2d 1179, 1174 (5th Cir. 1985) (reasoning that a "judgment in favor of the plan" included district court's judgment in plans' favor on ancillary points so as to trigger mandatory assessment of interest, penalty, and attorney fees where plans sought both unpaid contributions and ancillary relief, despite the fact that the employer paid the delinquent contributions before judgment).

We further hold that as to liquidated damage assessments which are keyed to these "unpaid contributions," the remedy offered by section 1132(g) is exclusive. To recover liquidated damages outside of and in

addition to the statutory frame work of section 502(g) with its 20% limitation would allow a more expansive remedy than that authorized by the Congress. Thus, to the extent that the Fund's late payment and audit assessment figures reflect assessments based upon contributions which were still unpaid at the time judgment was awarded, recovery of these amounts is barred, and the Fund's recovery is limited to those liquidated damages allowed under section 1132(g)(2).

This returns us to the precise issue raised by Michigan Carpenters: whether Michigan Carpenters is entitled to late payment or audit damages which reflect assessments based on contributions which were untimely, but ultimately paid prior to judgment.⁸ Section 1132(g)(2) does not

⁸At trial, the plaintiffs presented evidence that delinquent contributions were assessed on either late payment liquidated damages or audit assessments, but not both.

explicitly cover this situation. Each case which has dealt with the issue has held that delinquent contributions do not qualify as "unpaid contributions" and liquidated damages are not recoverable under 29 U.S.C. § 1132(g)(2)(C)(ii). See *Idaho Plumbers, supra*; *Gittleman, supra*; *Building Tech, supra*; *Glaziers, supra*; *Bennett, supra*. In *Gittleman*, the Eighth Circuit further ruled that liquidated damages were also not recoverable under a collective bargaining agreement on the grounds that "[t]he detail and comprehensiveness of the section 1132(g)(2) remedy supports the conclusion that it was meant to supplant any remedy that other wise would be available." 857 F.2d at 479 (internal quotation omitted). By contrast, in *Glaziers*, the district court held that liquidated damages for all

Thus, there would be no "double recovery" of liquidated damages on a delinquent contribution.

contributions paid in an untimely manner were recoverable as mandated by the operative collective bargaining agreements. 619 F. Supp. at 1805. The court did not discuss ERISA preemption. In *Bennett*, the court held that the plaintiff plans were not entitled to liquidated damages on untimely contributions, declining to extend section 1132(g)(2)(C)(ii) to untimely payments. 591 F. Supp. at 605-06. The court did not discuss a contractual theory of liability.

The most comprehensive treatment of this issue is found in the Ninth Circuit's decision in *Idaho Plumbers, supra*. There the court concluded that federal common law principles apply to determine the enforceability of a liquidated damages provision under a labor agreement. 875 F.2d at 216-17 (quoting H.R. Rep. No. 869, 96 Cong., 2d Sess. (1980) (Part II), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 3037-38) (emphasis

supplied by *Idaho Plumbers* court). See also 126 Cong. Rec. H7899 (daily ed. Aug. 16, 1980) (statement of Representative Thompson). The court therefore concluded that "Congress intended only to preempt laws limiting liquidated damages to an amount below the 20% level when the terms of 1132(g)(2) are satisfied." *Id.* at 217. (emphasis in original). See also *Central States*, 522 F. Supp. at 928 (quoting remarks of Representative Thompson regarding H.R. 3904 in the floor debate of the House).

We agree with the reasoning and conclusion of the Ninth Circuit in *Idaho Plumbers* that a fund has a valid claim for late payment and/or audit damages pursuant to its collective bargaining agreements with defendants, not covered by section 1132(g). We caution, however, that in assessing liquidated damages to those contributions not covered by section 1132(g)(2), the

district court should examine whether the liquidated damages provisions in the operative collective bargaining agreements constitute a penalty under federal common law. See *Idaho Plumbers*, 875 F.2d at 217-18.

We now turn to Michigan Carpenters' final contention. The Fund argues that the 20% figure referred to in section 1132(g)(2)(C)(ii) should be assessed on a *per annum* basis. In essence, Michigan Carpenters is asking the court to allow recovery of liquidated damages of up to 20% annually. Nothing in section 1132(g)(2)(c)(ii) or its legislative history, however, suggest that liquidated damages should be assessed on a *per annum* basis. See *Bennett*, 591 F. Supp. at 607. We therefore decline to adopt such an interpretation in the absence of explicit language authorizing it.

For all the foregoing reasons, the judgment of the district court is affirmed

as to the issues raised in the appeal. As for the issues raised in the cross-appeal, the district court's conclusions regarding defendant Leoni are affirmed. On the liquidated damages issue, we VACATE and REMAND the district court's judgment and order and direct that it make findings of fact as to damages in accordance with our holdings on the liquidated damages issue. The district court's findings are to be limited to Michigan Carpenters.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION - GRAND RAPIDS

MICHIGAN CARPETERS COUNCIL

HEALTH & WELFARE FUND, et al.,

Plaintiffs,

v.

CHARLES J. ROGERS CONSTRUCTION

COMPANY, et al.,

Defendants.

ORDER

At a session of said
court, held on the 9th
day of August, 1985

PRESENT: HONORABLE WENDELL A. MILES,
Chief U.S. District Judge

THIS MATTER having come before the Court
upon request by the Defendants Construction
and Excavating to lift the Court's prior
restraining Order and any extensions the
last of which were dated June 3, 1985, all
parties being present, and the Court being
otherwise informed;

IT IS HEREBY ORDERED that the temporary
restraining order as aforementioned is
HEREBY VACATED, for the reason that
Defendants Excavating and Construction have
agreed to notify and send to Plaintiffs'
counsel 10 days prior to the hearing date,
the written proposed modification for
review. The Defendants will notify
Plaintiffs' counsel of the date and time
upon which the proposed modification will be
submitted to Judge Harry B. McAra of the

Genesee County Circuit Court for his approval;

IT IS FURTHER ORDERED that the Court is expressly not assuming jurisdiction of the reorganization plan, which jurisdiction is with Judge Harry B. McAra in the Genesee County Circuit Court.

Dated: _____
WENDELL A. MILES, Chief
U.S. District Court Judge

APPROVED AS TO FORM
AND CONTENT Dated: _____

GEORGE R. HAMO

APPROVED AS TO FORM
AND CONTENT Dated: _____

GEMRICH, MOSER,
DOMBROWSKI, BOWSER & FETTE

By: _____
EDWARD FREEBERG

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CARPENTERS
COUNCIL HEALTH AND
WELFARE FUND, et al.

Plaintiffs,

No. G83-582 CA5

v.

CHARLES J. ROGERS
CONSTRUCTION et al.

FINDINGS OF FACT
AND CONCLUSIONS
OF LAW

Defendants.

Plaintiff[s] are voluntary unincorporated trust funds established pursuant to section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., and provide a variety of pension, health, and welfare benefits to employees throughout the state by means of employer-funded contributions. Plaintiffs brought this action to collect \$500,000 in alleged arrearages and penalties, and to compel defendants to keep current on their

contributions, under collective bargaining agreements which purportedly obligate defendants to make periodic contributions for the benefit of defendants' employees.

The matter was tried before the Court, sitting without a jury, over eleven trial days. The Court heard testimony from twenty witnesses, and received into evidence well over two hundred exhibits, the majority of which were documents consisting of many pages and varying degrees of complexity. The Court has taken copious notes at trial, has read the entire transcript and all depositions, and has reviewed all of the evidence submitted by the parties. The following shall comprise the Court's findings of fact and conclusions of law, required by Fed. R. Civ. P. 52(a). Before doing so, however, the Court would like to compliment the parties on an exceptionally well-tried case. Trial of this matter was spread out over seventeen months, imposing

not inconsiderable burdens upon counsel, the witnesses (some of whom were frequently recalled for testimony), and the Court in terms of juggled schedules, interrupted concentration, reassembled exhibits, and long distances traveled.

Additionally, the issues and factual circumstances involved were highly complex, requiring of the parties and the Court the highest attention to detail, the patience to develop and redevelop particularly difficult areas, and the mental agility to deal intelligently with unexpected evidentiary turns. The parties and counsel have conducted this litigation in a spirit of courtesy and cooperation, for which the Court commends them.

Findings of Fact

1. Defendants Charles J. Rogers Construction Company; C.J. Rogers, Inc.; Chas. J. Rogers Excavating, Inc.; and W.P.M., Inc. are corporations organized

under the laws of Michigan. Defendant C.J. Rogers-Cooper is a joint venture which operated in Michigan in the mid-1970s.¹ Defendant William H. Leoni, Sr. is a building contractor and is the president of Inc., Construction, and Excavating. Additionally, Leoni is the sole shareholder of LERO Corporation, a holding corporation which owns a majority of the shares of stock of Construction and Excavating. (Ex. 67 and 70).² Defendant W.P.M. is a corporation shareholder [as] are Leoni, Sr.'s sons William H. Leoni, Jr., Patrick Leoni, and Michael Leoni. Leoni, Jr. is the president of W.P.M.

2. All defendants are, generally, in the building construction business. Excavating was incorporated in 1932 by Charles Rogers³ to engage in trucking, hauling, excavating, and general contracting business. Construction was incorporated at some time prior to 1964⁴ and also engaged in the

general contracting business. There were some significant differences in the work performed by the two companies, however, as Construction primarily performed piling, paving, and tunnel work, not done by Excavating, whereas Excavating was primarily involved in trucking and road building. Inc. was incorporated on May 1, 1980 and performs substantially the same types of work as Construction and Excavating. Rogers-Cooper was a joint venture formed in the mid-1970's to perform certain specific construction contracts. Construction collaborated with Cooper Construction Company on approximately five contracts until the joint venture entity ended in 1978. W.P.M. was incorporated on October 20, 1978. (Ex. W). Although its Articles of Incorporation state that its purpose is to engage in, inter alia, the general construction and excavation contracting business, W.P.M. operates on a smaller scale

than the other Rogers companies. (Tr. IX, 6-91).⁵ W.P.M. also subcontracts or engages in joint ventures with Cliff's United Development, a minority contractor, in order to satisfy state minority contracting requirements.

3. The events leading up to Inc.'s incorporation from the background to this lawsuit. The Court believes it necessary to relate these facts in order to understand the instant dispute.

4. Both Excavating and Construction were incorporated as small, family-owned and operated corporations. (Exs. 66, 70; Tr. II, 5-8). Before 1975, controlling interests in Excavating were held by Charles Rogers' two sons, Charles K. Rogers and Lawrence P. Rogers, although other family members held lesser amounts of stock. (Ex. L4). William H. Leoni had been employed by Construction since 1952,⁶ and, until 1975 held a small block of stock in Excavating.

5. In 1974 Excavating found itself in financial straits and had no operating funds. One of its major creditors, the National Bank of Detroit ("NBD") insisted that Excavating's shareholders advance money to the company. Larry and Chuck Rogers thus loaned \$100,000 each to Excavating in return for promissory notes. (Deposition of William Martz, pp. 9-11).⁷

6. Management difficulties remained unresolved, however. To restore Excavating to profitability, Excavating's bonding company, Aetna, required Leoni to assume the role of active manager. This move was less-than-satisfactory, due to intrafamilial quarrels between Excavating's shareholders, and it was determined that consolidation of ownership of the company was the best way to proceed. As no outside purchasers were found, Leoni agreed to buy out the positions of the other shareholders in both Construction and Excavating. It was at this

time that LERO Industries, Inc. was incorporated, on the advice of Leoni Sr.'s bank, to be a holding company for the stock of the two Rogers companies. (Exs. L4, 68; Tr. II, 14-15). Under the May 20, 1975 agreement, the companies agreed to redeem all outstanding shares of stock for \$646,000. Leoni personally guaranteed the companies' obligation. The agreement further provided that the debts to Chuck and Larry Rogers should be discharged at the closing by payment to them of \$50,000 each. Thus, although the Rogers brothers had each loaned \$100,000 to Excavating, the company's poor financial condition, and the lack of interested buyers compelled them to accept a discounted price for the promissory notes which they held. After the sale, Leoni, Sr. and his wife owned 100% of Construction's stock, and 98% of Excavating's stock. Leoni, Sr. became president of both companies from that date forward.

7. The closing for what has been referred to as the "family sale" occurred on May 27, 1975, one week after the agreement had been entered into. At this time, Joanne and William Leoni, as trustees for certain Totten trusts, paid the Rogers brothers \$50,000 each for the promissory notes. (Martz Dep., 39-40). Thus, although the agreement (Ex. L4) itself states that the notes would be discharged at the time of the closing, the notes were actually assigned to the Leonis, and remained outstanding debts of the Excavating company. These promissory notes had been, and continued to be, secured by Excavating's accounts receivable. These financing arrangements were supervised by the Michigan National Bank (Ex. C5) and the corporate attorneys. The entire transaction is thoroughly documented, and the Court finds there to have been no improprieties in the "family sale" of May 20, 1975. The notes were carried on the books as "note

payable--officer" until 1980.⁸ Although Mrs. Leoni was never an officer of either Construction or Excavating, the note was carried on the books as "note payable--officer" as an accounting convention. (Solner Dep., 2-10-84, 24).

8. The State of Michigan required both Construction and Excavating to submit joint bids on state highway work, to eliminate the possibility of collusion. Accordingly, Construction and Excavating often bid on state highway jobs as joint venturers. (Ex. AA; Tr. II, 12-13). These joint ventures required one company to complete the work awarded to the other if it could not complete such work. (Leoni Dep., 26-28). Additionally, at the insistence of the banks with which Construction and Excavating did business, the two companies were cross-collateralized on various loans. This did not indicate that Construction and Excavating were not in fact acting as

separate entities, but merely reflected the desire for extra protection on the part of the companies' financial partners, the banks. (Solner Dep., 9-23-84, 33-35).

9. In August of 1974 the Michigan National Bank advanced Excavating \$1.5 million, so that Excavating could pay off an outstanding loan owed to the National Bank of Detroit. The Michigan National Bank required the loan to be collateralized by both Excavating and Construction. Modifications were later required to be personally guaranteed by Leoni, Sr. (Tr. II, 11-12). On April 13, 1979 Michigan National Bank, one of the companies' largest secured creditors, notified Leoni that it was accelerating the promissory note underlying the loan. The bank contended that the note's term was for two years, whereas Leoni maintained that the note was a four-year note, and was thus not due. The issue of this loan became the subject of a

lawsuit filed by Construction and Excavating in the Genessee County Circuit Court. A temporary restraining order was obtained preventing seizure of the corporate assets by the bank; however, the adverse publicity caused severe damage to the companies' ability to carry on business. (Tr. II, 15-17). In fact, the companies lost their bonding and could not carry on business (Id.) and were in imminent danger of losing their assets to seizure by the Internal Revenue Service for unpaid tax liens. (Ortlieb Dep., 5-6).⁹

10. The Rogers companies' untenable financial situation compelled them in July of 1979 to file for reorganization in the Genessee County Circuit Court pursuant to Mich. Comp. Laws Ann. §§ 450.1204-450.1205. The Plan of Arrangement to be submitted by Excavating and Construction pursuant to the reorganization would present to the circuit court a plan for paying off general

creditors of both companies. (Ex. G). Judge McAra enjoined all creditors of Construction and Excavating from filing any suit against the companies to collect debts owed and from enforcing any lien.

11. The Plan of Arrangement filed with the circuit court proposed to pay off the general unsecured creditors over varying periods of time, with a 100% payoff to be made to electing creditors over ten years. Pursuant to Judge McAra's order, the two companies were required to notify all creditors, secured and unsecured, of the reorganization, and to submit a list of same to the court. The Court finds that representatives of plaintiff trust funds attended some of the circuit court hearings on the proposed reorganization, were aware of the reorganization, and were at all times on notices of the reorganization as it progressed. This finding is based on the testimony of Michael Gautheir (Tr. 1, 53-

56); Gerry Hall (Tr. IV, 8-9, 30); Cass Dombrowski (Tr. VIII, 274-277); Rene Ortlieb (Dep., 21); stipulation by Mr. Horton (Ortlieb Dep., 29-30). Also see Exs. QQ, 19). Good faith efforts were made to keep all creditors notified of the progress of the reorganization, and the information regarding the reorganization was available to all creditors. (Ortlieb Dep., 21; Ex. R3).

12. Hearings were held before Judge McAra on at least three occasions between December 1979 and October 14, 1980, when Judge McAra gave final sanction to the plan of arrangement. During this period of time, negotiations were ongoing with the companies' major creditors, including the banks, the bonding company (Aetna), the IRS and State of Michigan (to whom taxes were due), without whose cooperation the reorganization could not succeed. Also during this period, balloting by the general

creditors transpired, as a majority vote of acceptance of the plan was necessary for its sanction by the court.

13. At the time of filing of the petition of reorganization, no consideration had been given to the creation of a new corporation. (Ortlieb, Dep., 64). In mid-April, 1980, after consultations with Aetna, the companies' accountant, the banks, the companies' attorneys, Leoni decided to form a new corporation. This action was taken on the advice of the foregoing parties in order to present an acceptable balance sheet to Aetna. This would enable the new company to obtain the required bonding and State highway prequalification to continue business. (Ortlieb Dep., 13-17). The Court accepts Mr. Ortlieb's testimony that the new corporation was formed to obtain binding, without which either of the two Rogers' companies could not continue in business. Mr. Ortlieb's testimony with respect to the

discussions and events preceding the reorganization and incorporation of the new Inc. is corroborated by attorneys Solner and Martz, who were actively involved in the reorganization and formation of the new company. The Court specifically rejects the contention that formation of a new corporation was contemplated at the time the petition for reorganization was filed. Plaintiff's deposition exhibit (Ortlieb Dep.) shows that the accountant, Edmond Swad, prepared a summary of the necessary steps to be taken in order to form a new corporation; this document, among others, corroborates Mr. Ortlieb's testimony that consideration was first given to this plan in April 1980 long after the petition for reorganization had been filed. (Also see Solner Dep., 9-23-84, 12-14). Counsel for Leoni were in complete agreement that formation of a new company was absolutely necessary to continue in business at all.

Both Ortlieb and Solner agreed that, had a new company not been formed, the bank and Aetna would have repossessed the equipment, leaving nothing for the unsecured creditors. (Ortlieb Dep. 13-15, 21-22; Solner Dep., 9-23-83, 39-40). Further, according to Ortlieb, Leoni rejected out of hand the suggestion that he liquidate his debts by declaring bankruptcy; rather, Leoni chose a circuit court reorganization because it enabled him to pay his debts, albeit on a reduced scale. (Ortlieb Dep. 47-48; also see Solner 9-23-83 Dep., 74--discussion of Chapter 11 bankruptcy). In accepting this testimony, the Court specifically concludes that the incorporation of the new Inc. was motivated by good faith, legitimate business reasons and was untainted by any fraudulent purpose or desire to evade obligations to creditors. (Ortlieb Dep., 84).

14. Inc. was incorporated on May 1, 1980. Both Excavating and Construction by formal

corporate action agreed to sell all of the assets of the corporations and assign the account receivable, inventory, and uncompleted contracts to Inc.¹⁰ Inc. purchased the assets of the old corporations on the basis of the fair market value of the assets¹¹ in the form of two ten-year secured promissory notes given by Inc. to Excavating and Construction. The purchase price of the assets was well over \$5 million. (Ex. A). Additionally, Construction and Excavating were issued \$1 million of preferred stock with an indefinite redemption period as payment for the accounts receivable and inventory. (Ex. A).

15. Notice was given to all creditors and to the circuit court of the proposed sale of assets and incorporation of Inc. Judge McAra's approval was necessary for the two companies to dispose of their assets. Robert Kotz, counsel to the creditors' Oversight Committee testified that he, and

all creditors, were notified of the proposed plan of sale of assets to Inc. (Kotz Dep., 5-10; Dep. Ex. 1). Judge McAra approved the sale of assets to the new corporation.

16. The question of the initial capitalization of Inc. was hotly contested and closely scrutinized at trial. According to Solner, who formed Inc., in order for the new company to receive continued bonding, it was necessary to obtain certain "Liability-free" assets through the purchase of the two old companies' assets. Effective May 1, 1980 Inc. purchased the assets of Construction and Excavating, conditioned on Excavating paying \$200,000 cash to Inc. and on the circuit court's approval of the plan.

17. On Solner's recommendation, Joanne Leoni was to be the sold shareholder of the new corporation, Inc. Joanne Leoni assigned to Inc. the two promissory notes that she held as assignee of the two Rogers brother[s]. Each of the notes, as

previously noted, had a face value of \$100,000. These notes were secured by certain accounts receivable of Excavating. These receivable were described by William Martz as "net quick assets," or assets with high liquidity because of their easy convertibility to cash. Mrs. Leoni also executed a subscription agreement to purchase 200,000 shares of common stock of Inc., payable in cash or property. (Ex. 69). The creation of Inc., was conditioned upon payment in cash of the subscription agreement and upon approval of the circuit court. (Ex. A; Solner Dep., 2-10-84, 39-43). It was the intention of the incorporators and their representatives that, if any condition should not be fulfilled, the creation of Inc. would not be consummated. (Id.) Inc. did not call for payment of the subscription agreement until October 114, 1980, the date on which Judge McAra approved the sale of assets to Inc.

The subscription agreement was not payable until "the demand of the Treasurer," which demand was not made until October 14, 1980; further, share certificates were not issued until October 14, 1980. Under such circumstances, Mrs. Leoni's obligation to pay for the stock did not become due until October 14, 1980. Ivory v. Lamoreaux, 241 Mich. 226 (1928); Gobles Cooperative Ass'n v. Albright, 243 Mich. 68 (1929) (concurring opinion of Fellows, J.). By this time, the accounts receivable securing the two promissory notes had in fact been paid. (Ex. V4). Thus, by October 14, 1980, the date the subscription agreement was called, the pre-conditions to Inc.'s creation had been fulfilled.¹²

18. The promissory notes were in fact valid consideration for the subscription agreement.¹³ Although the statute of limitations--in this case, six years--may have run on the two demand notes originally

executed by the Rogers brothers, the statute of limitations does not eradicate the underlying debt but merely prevents the creditor from enforcing his rights. Further, the debtor may expressly or implicitly waive the defense of limitations. Here, Excavating waived whatever defenses it may have had to the enforcement of the notes. As indicated above, by the time the subscription agreement was called by inc., the notes had been paid. Thus, there was no irregularity in the execution or performance of the subscription agreement executed by Mrs. Leoni, nor was Inc.'s creation attended by fraud on the part of its incorporators.

19. In the lawsuit by Construction and Excavating against Michigan National Bank, paragraph 20 of the complaint refers to the "undercapitalization" of the two companies. (EX. 37). No substantive evidence of undercapitalization of either company was presented by plaintiffs. The Court declines

to find that either company was undercapitalized, due to a complete failure of proofs on this point.

20. As to Inc., the evidence shows that it was adequately capitalized. Solner, one of the corporate law experts, testified that the \$200,000 invested by Mrs. Leoni was sufficient capitalization for Inc., as it enabled the new company to obtain minimal bonding. Although less than \$200,000 would have been insufficient to obtain state prequalification, Inc.'s deficit-free credit rating enabled it to prequalify. Prequalification is determined by the state on the basis of three or four factors, one of which is the amount of capitalization. In this case, Inc. was capitalized not only by the \$200,000 note secured by the receivables from the old companies, but also by the \$1 million in preferred stock. As noted, the preferred stock carried an indeterminate redemption period, so there was no immediate

obligation to redeem the stock. Taking also into account the "net quick" assets, equipment, and current contracts, the state prequalified Inc. for \$20 million of state work. Solner explicitly stated that Inc. was not thinly capitalized. (Solner Dep., 9-23-83, 37-40, 63-67; also see Martz Dep., 18-19). No rebuttal evidence was presented, and the Court specifically finds that Inc. was properly and adequately capitalized.

21. There was some suggestion that the Leonis had improperly diverted corporate assets to their personal use in the capitalization of Inc. As noted above, Judge McAra's temporary restraining order prevented all creditors from realizing on their debts; yet, Mrs. Leoni's promissory note owed by Excavating was satisfied and used as start-up capital for Inc. The Court regards this allegation with the utmost gravity, as diversion of corporate funds to personal use, and in disregard of the

circuit court's temporary restraining order, would indicate that Inc. was improperly formed, and would tend to substantiate the allegations of fraud made by plaintiffs. In considering the merit of this allegation, the Court has meticulously examined the testimony of the parties most closely associated with Inc.'s formation and with the circuit reorganization. The initial order signed by Judge McAra (Ex. G) enjoined all creditors of Excavating and Construction from proceeding on their debts "until further order of the Court." The restraining order was issued in part to allow the companies to work out a plan of arrangement. (Kotz Dep., 37; Solner Dep., 2-10-84, 37). Judge McAra did in fact approve the proposal to create Inc. at a hearing held on October 14, 1980. (See also Ex. T). That hearing was brief, and Judge McAra approved the plan based on Mr. Ortlieb's representations that all creditors

had been apprised of the proposal and that most had approved. An evidentiary hearing was not held, and details of Inc.'s incorporation were not revealed, nor did Judge McAra express any desire or need to review such details. (Ex. R2).

It is also clear that Mr. Swad, the accountant who prepared the financial statements of the two companies for the pertinent time period, took account of the "note payable--officer" in all the pertinent financial statements. (See particularly, Exs. S4, T4). Mr. Swad expressly understood that Inc. was to be capitalized using the notes. (Ortlieb Dep. Ex. 6). Mr. Martz was aware of Inc.'s capitalization. (Martz dep., 16-18, 42). Mr. Solner, as the architect of Inc.'s incorporation, was of course aware of the capitalization, and further stated that all creditors were notified of the proposal and did not object. (Solner Dep., 9-23-83, 16-17, 38-39, 74-75;

Solner Dep., 2-10-84, 14-16). The Court has paid particular attention to the testimony of Mr. Kotz, the attorney for the Oversight Committee. As he represented the Committee in its dealings with the reorganization, and was not an agent for Leoni or the companies, the Court places particular reliance on his knowledge of the capitalization. His testimony indicated that he and the creditors had seen the financial statements (Kotz Dep. 35); he was aware that receivable[s] were transferred to Inc., but did not know the precise breakdown between capital and purchase price (Id., 29); he knew there were obligations running from the companies to the Leoni family, but did not know the particulars (Id., 36); he was aware that such notes were disclosed by the financial records but could not recall the exact notes or exact amount (Id., 57); it was his understanding that the bonding company, the bank, the governmental

entities, and the Oversight Committee were "acutely aware" of the financial transactions (Id., 73-74). Plaintiffs' close cross-examination of Kotz showed that he was never solicited with respect to Joanne Leoni as a creditor of Excavating (Id., 63-64) and was not aware of any specific notes to Chuck and Larry Rogers which had been assigned to the Leonis (Id., 57). Nonetheless, the thrust of Mr. Kotz' testimony is that he had seen the financial records, was indeed aware of obligations running to Joanne Leoni, and was generally aware of the entire transaction. Cross-examination did not alter his fundamental testimony. The Court concludes, therefore, that the Oversight Committee's recommendation to Judge McAra to approve the sale of assets was based on full knowledge of the transaction by which the notes were assigned. Plaintiffs have vigorously pursued the theory that these notes were

surreptitiously diverted to Inc. without the knowledge and consent of the creditors or the circuit court. However, the evidence simply does not support that claim; if anything, the evidence solidly supports the finding that the transaction was scrupulously monitored by the creditors of the two companies and that their financial affairs were laid naked to all who had an interest in them. It simply strains credibility to find that the attorneys, accountants, and the large creditors, were unaware of the transaction, or, which must be plaintiffs' theory, that they somehow conspired to divert the notes to the Leonis' benefit. The Court thus specifically finds that corporate funds were not fraudulently diverted to the Leonis or Inc., and that Inc. was not capitalized in violation of Judge McAra's temporary restraining order.

22. The Court is somewhat perplexed by Mr. Leoni's representation to Judge McAra

that he was the sole shareholder of Excavating and Construction, (Ex. 02.22.36); in reality, he owned slightly less than 100% of the shares of each company. The Court also notes that Mr. Ortlieb, in his statements to Judge McAra also referred to Mr. Leoni as the "sole shareholder," however. (Ex. 02, 19). The Court specifically finds that this was not a material representation. Judge McAra was attempting to elicit from Mr. Leoni concurrence in the misrepresentations made that day by Mr. Ortlieb, the vast majority of which concerned other details of the reorganization. The statement regarding being the sole shareholder was made strictly in passing. The Court also notes Mr. Kotz' statement that the representation was not material (Kotz Dep. 18-22).¹⁵

23. After May 1, 1980 Excavating and Construction assumed inactive status. They continue to make payments pursuant to the

reorganization plan, but are not actively conducting business. They have no assets except notes receivable and claims in litigation.

24. Inc. did not assume any unsecured debt of Excavating or Construction other than the debts secured by equipment liens. The two old companies continue to retire their debts, however.

25. After the May 1980 incorporation, Inc. began business utilizing the same personnel, supervisors, equipment, officers, and locations as had been used by Construction and Excavating. Inc. completed the contracts entered into by the old companies.

26. Prior to the 1980 reorganization, the relationship between Construction and Excavating evidenced a certain degree of mutuality. Leoni and Charles Lawson were both officers of both corporations. Leoni, as noted above, had controlling interests in

both corporation[s]. Construction owned the property where Excavating operated in Melvindale. In fact, Construction's tax returns for 1979 and 1980 indicate as its address the Melvindale location. (Tr. II, 41-43). Construction's correct address has been officially registered with the state Corporations and Securities Bureau since 1962, however. (Tr. III, 113; Ex. 55). Between 1978 and 1980, Mrs. Morton, payroll supervisor for Inc., prepared the payrolls for both Construction and Excavating; this occurred, however, because Construction had a computer at its Flint location, and Excavating had no such facility. (Tr. I, 4-5; Lawson Dep., 14). As noted above, Construction and Excavating occasionally prepared joint bids when required by the State on state highway projects.

27. Generally, however, the two companies prepared separate bids and obtained separate pre-qualification status. (Tr. III, 93-95).

The state's requirement of joint budding to prevent collusion was not motivated by any actual incident of collusion; it was designed to prevent a recurrence of one situation in which the two companies, bidding separately and independently, happened to be the only companies bidding on a particular job and were thus both low bidders. (*Id.*) On the few occasions that Construction and Excavating were awarded a joint bid, each company worked separately in its respective geographic location. (Tr. II, 13; Tr. III, 29). The companies also filed separate tax returns, had separate federal and state tax identification numbers, separate bonding, different fiscal years, separate annual financial appraisals, and separate financial statements. (Exs. Y, Z, A2, C2, D2, H2, I2, J2, M2).

28. Construction and Excavating operated in distinct geographic regions, Flint and Melvindale, respectively. Construction

rarely operated in the Detroit area--perhaps for three out of 150 jobs per year. Excavating never operated in the Flint area. (Tr. III, 84-85).

29. The companies maintained separate equipment and repair operations and had substantially different customers. (Tr. I, 31; Tr. III, 95-96; Tr. VIII, 10, 20, 98-99, 205-206). They each had a separate telephone number. (Tr. III, 136). Some cross-over of equipment did occur. (Tr. VIII, 10). Although Leoni was president of both companies, and Lawson an officer of both, day-to-day management responsibilities were divided between them. Leoni retained daily management and labor relations duties on;y for Construction. These daily responsibilities including labor relations and signing of collective bargaining agreements,w ere handled for Excavating by Lawson between 1978-1980, and before that, by three other individuals. Leoni rarely

participated in Excavating's day-to-day affairs. (Lawson Dep., 17; Tr. III, 83-84; Tr. VIII, 8-9, 95-96, 204-205). Lawson's knowledge of and responsibilities for Excavating's affairs were limited to day-to-day management, however, he had no involvement with many crucial financial decisions, such as the reorganization, the cross-collateralization of the loan with Michigan National Bank, and payment of fringe benefits. It was Leoni, for example, who instructed Mrs. Morton to cease paying late payment assessment levied against Excavating, Construction, Rogers-Cooper, and Inc. (Tr. I, 18; Tr. VI, 35). Each company had separate supervisory personnel. (Tr. III, 96; Tr. VIII, 12).

30. The evidence showed that there had been some interchange of employees between Construction and Excavating. (Ex. 72). This interchange was insignificant, however, representing only 8% and 13% of total

employee hours worked by employees of Construction and Excavating, respectively. (Tr. VIII, 240-243; Ex. A3). Generally, the two work forces did not intermingle prior to May of 1980. (Tr. VIII, 10, 99, 117, 207, 241-246).

31. On the occasions when Construction and Excavating worked together on a job, for instance in the relationship of contractor-sub, the companies would formally invoice each other for work performed. (Tr. VIII, 14-15, 100-101).

32. Curtis Baker, a foreman with Construction, testified that of twenty-two years spent with the company, he worked in Melvindale for only two weeks. (Tr. II, 55-56). He admitted that knowledge of the Detroit-area company was "common" among Flint employees, but stated that he believed the companies were "all basically the same." (Tr. II, 49). Roy Lee Turner, a laborer for fifteen years for "C.J. Rogers" in Flint

testified that he had never worked in the Detroit area nor had seen Detroit-area employees come to work in Flint. (Tr. II, 68). He had "heard of" a Detroit Rogers company, but stated that "all [he knew]" was that he work for C.J. Rogers. (Tr. II, 69). As these men were plaintiffs' witnesses, their testimony supports the Court; finding that there was little significant interchange among employees of Construction and Excavating.

33. William Martz, attorney for Construction and Excavating, stated that, in his opinion, the two companies were not alter egos of each other and had always operated at arms length in their mutual transactions. Martz felt it significant that the companies kept separate books, jobs, contract bidding, and bonding. (Martz Dep., 21). Solner, in forming Inc., discussed with Leoni and Swad, the accountant, the necessity for separating the

financial affairs of the new corporation from those of the old companies. (Solner Dep., 9-23-83, 80-81).

34. As previously noted, Rogers-Cooper was a joint venture entity of construction and Cooper Construction Company existing until 1978. (Tr. I, 15; Tr. VIII, 82). It performed \$30 million worth of tunneling jobs in Detroit, Bay City, Oregon and Ohio. (Tr. VIII, 77, 91). Construction provided the bondability and financing and Cooper Construction provided the management and employees. Ninety-five percent of the equipment used was purchased separately by the joint venture, and the remaining five percent belonged to Construction. (Tr. VIII, 76-77). The joint venture was headquartered in Mount Clemens, Michigan. However, Mrs. Morton of Construction performed the payroll out of Construction's Flint office, and the checks were cut at C.J. Rogers Transco in Melvindale. (Tr.

VIII, 84). Mrs. Morton was paid by the joint venture for these duties. (Tr. VIII, 92). Rogers-Cooper had a separate federal tax ID number, filed separate tax returns, kept separate books, Michigan Employment Security (MESC) registrations, quarterly reports. (Tr. 76-78; Ex. S2). Labor relations for the joint venture was controlled by Fred Rozelle, president of Cooper Construction. (Tr. VIII, 80). Although the joint venture never executed contracts with a union, fringe benefits were paid to the plaintiff trust funds on behalf of the employees (Tr. VIII, 88-89). Payment of such benefits was made, however, because the joint venture jobs required certified payrolls. (Tr. VIII, 91).¹⁶

35. It is standard practice for a union to seek separate collective bargaining agreements with bona fide joint ventures, (Tr. X, 119, 202-203), and it is usually possible for a union to discover which joint

venture are being operated within its (the union's) jurisdictional area (Id.).

36. No collective bargaining agreements were produced at trial obligating Rogers-Cooper to pay fringe benefits to plaintiff trust funds; neither Leoni, Mrs. Morton, nor Michael Gautheir, auditor for plaintiff, had ever see such an agreement. (Tr. I, 29, 52; Tr. III, 34).

37. Construction operated another joint venture with a company called "Pneuma North America." This joint venture lasted approximately three months in 1978. The relations between Construction and Pneuma were formalized by contract, which provided that Pneuma was to be the managing partner with exclusive power to supervise on-the-job work, and that the relationship of the parties was limited to the performance of the contract. The joint venture had its own office, filed separate tax returns, and had a separate federal ID number (Tr. I, 25-29,

Ex. B). The joint venture agreement also specifically provided,

Nothing herein shall be construed to create a general partnership between the parties nor to authorize either party to act as general agent for the other party, nor to permit either party to bid for or to undertake any other contracts for the other party.

The contract was apparently signed by Richard Maloblocki as president of Pneuma North America (also see, Tr. I, 25) and Leoni, as president of Construction. In seeking to obligate defendants for certain of the fringe benefits claimed to be owed, plaintiffs point to a contract executed by Maloblocki for "Charles J. Rogers Construction Co." with the Michigan Laborers for the payment of fringe benefits. The Court specifically finds, in light of the contract provision above, that Maloblocki had no authority to execute the contract, and that execution of such contract was beyond the scope of his authority. Although

plaintiffs did not receive actual notice of the limited joint venture contracts, they must be held responsible for limitations on Maloblocki's authority. This is especially true in light of the conceded practice of obtaining separate contracts from bona fide joint ventures. Plaintiffs could have discovered, had they exerted themselves, that the relationship between Pneuma North America and Construction was that of a bona fide joint venture and the scope of Maloblocki's authority. The Court specifically finds that the so-called Maloblocki agreement is not binding on Construction, as being beyond the scope of Maloblocki's authority.

38. When Inc. was formed new time cards and daily report sheets were filled out by the employees. Their year-to-date withholding balances were zeroed out; however, they did not fill out new withholding forms. (Tr. VIII, 118-119,

140).

39. It was disputed whether the plaintiff fringe benefit funds were notified in some way of the corporate changeover in May 1980. the Court specifically finds that plaintiffs were so notified by Mrs. Morton. Although plaintiffs may not have understood the purport of the reorganization, it was not because they were not informed. (Tr. X, 338-340, 369, 371).

40. There is no question that some of the corporate formalities were not scrupulously observed. For instance, some of the corporate minutes were not entered into the books of some of the Rogers companies until after trial in this matter had commenced. Martz testified that the minutes of some corporate meetings had been recorded in not form by himself, but simply had not been formally entered into the books after 1979. Nor were corporate meetings regularly held. The Court does not place great emphasis on

the informality which sometimes characterized the companies' business. The more important factors, such as corporate financial affairs, were kept separate, and there was no improper commingling of personal with corporate funds.^{17, 18}

41. The reorganization caused considerable confusion for all concerned. During the period of the reorganization various name changes were implemented among the companies. Inc. was originally incorporated as "CJR, Inc."; "Chas. J. Rogers, Inc." became Chas. J. Rogers Excavating, Inc." Leoni agreed that these changes were confusing. (Tr. III, 129). In fact, stamps, stationery and checks order for Inc. (Tr. VI, 43) read "Chas. J. Rogers, Inc." and continued to be used until May 1981 even after an amendment to the Articles of Incorporation, officially changing the new company's name to "Inc." had been filed (Tr. VI, 20, 21, 34). Although the Court

accepts that such matters as the name on company checks were the least of the Rogers companies worries at the time (Tr. VI, 51-52), it is indicative of the less than meticulous efforts at keeping the companies strictly separate.

42. The confusion evidenced by the corporate name changes was further pointed out by the fact that Inc. made fringe benefit payments alternately under the names "C.J. Rogers Inc." and Chas. J. Rogers, Inc." until December 1980. (Ex. 39). Only in the spring of 1981 were Inc.'s affairs finally straightened out. Some of these payments were made for employees of the old companies for previously undertaken bonded work, on accounts set up at the insistence of the bonding company and the bank. (Tr. VI, 12-17, 45-46, 58-59; Ex. 34).

43. Excavating had a checking account bearing both names, Construction and Excavating; this account was set up at the

insistence of the bank; (Tr. VI, 30-31; Ex. 42). Each company maintained its own, separate checking accounts in addition to the one joint account. (Tr. VI, 53).

44. The companies have made fringe benefit contributions for obligations owed by the other companies. For instance, Inc. has made at least a few contributions for Construction and Excavating after the May 1980 reorganization (Tr. VI, 12) and Excavating has reported that it was making fringe benefit contributions for Construction's employees. (Tr. VI, 18; Ex. 43). Defendants have at times used different names on their monthly reporting forms. (Tr. VII, 157), and have used the same identification number for different corporations (Ex. 107).

45. The Court finds that some of this confusion is due to the inevitable sorting out of affairs during the time of Inc.'s incorporation in May 1980 (Nov. 29, 1983

Tr., p. 145). Some of the confusion may also be due to the negligence of the auditors, who did not take care to match up contributions with the correct company; the auditors conceded that they did not even look at the names that came in on the report because there had been no dispute as to contractual liability (Id., 143). As previously stated, the auditors were on notice that a new corporation had been created.

46. In establishing their claim that the Rogers companies are contractually obligated to make fringe benefit contributions, plaintiffs have relied on various so-called "rollover" provisions, employer registrations, and powers of attorney signed by Leoni or other agents of the Rogers companies. Such documents continue the main contract in effect between the union and the employer without the necessity for executing a master contract. A representative

"rollover" clause provides:

[T]he employer agrees that, unless he notifies the Union to the contrary by certified mail at least sixty (60) days prior to the termination date of this Agreement or any subsequent Agreement, the employer will be bound and adopt any Agreement reached by the Union and the Association during negotiations...

At trial, Leoni stated that he understood the purport of the provisions as meaning, with respect to employer registrations, that fringe benefits would be paid to the registration "number" provided to the employer; that, with respect to powers of attorney, that the employer association was given power to bargain for the individual employer. He testified that he did not believe, however, that the various provisions and rollovers constituted contracts that would bind the employer year after year until such time as he formally terminated the contract. "Absent a signed contract, I had no contract." (Tr. III,

32). The Court specifically finds, however, that Leoni fully understood the purport of the registration and rollover provisions requiring him to give notice of intent to terminate by certified mail. Construction and Excavating did resign from the Michigan Roadbuilders Association on August 17, 1978 (Ex. R6); no evidence was presented, however, of termination by either company of the contracts by certified mail as required.

47. The question of a contract signed in February 1981 by Leoni on behalf of "Chas. J. Rogers, Inc." was hotly disputed at trial. "Chas. J. Rogers, Inc." was a dormant corporation after May 1980. Leoni testified that Hall, the Laborers' business manager, requested him to sign the agreement for "Rogers, Inc.", and that he did so, fully knowing that that company was dormant and not actively in business. Leoni took the position that this contract, executed on behalf of Excavating, should not bind Inc.

(Tr. III, 44-47). Hall, on the other hand, testified that he requested Leoni to sign on behalf of the "new Rogers company." (Tr. IV, 15). This question is significant as, if Hall's testimony is fully credited, it tends to show that Leoni knowingly attempted to deceive Hall by signing for a company which Leoni knew was not active. Hall later testified, however, that he believed Leoni to be a man of his word and did not believe Leoni set up Inc. to evade his fringe benefit obligations. (Tr. IV, 72). Moreover, Hall testified that he knew a new Rogers company had been formed, and that he believed "Chas. J. Rogers Inc." was the name of the new company; he had never asked, nor had Leoni told him, what exactly the new company had been named. (Tr. X, 126-127). During the April to September 1980 period, Hall had seen paychecks with the names "Chas. J. Rogers Inc." and "C.J. Rogers Inc." (Tr. X, 134). In light of the

confusion which attended Inc.'s creation, it is not surprising to the Court that Hall may have been confused as to the name of the new corporation, and that he may well have requested Leoni to sign for Excavating, although intending to sign up Inc. It is also not completely implausible that Leoni sincerely believed Hall to be requesting a contract with Excavating, as various witnesses testified that, although dormant, the two old companies could indeed recommence active operations. (Tr. X, 216-217; Ortleib Dep. 48-49). The Court does not believe that plaintiffs have borne their burden of showing that Leoni acted with specific intent to deceive Hall in this matter. Plaintiffs have emphasized Leoni's willingness to take advantage of Hall's ignorance on the point of the new company's name, to avoid creating contractual obligations for the new Inc. However, Hall himself conceded the adversarial nature of

employer-union relationships. (Tr. X, 136, 140). The Court is unwilling to find fraud from what may be characterized as sharp business practices, especially where there may have been some negligence on the part of Hall in not knowing the correct name of the entity with which he was trying to secure a contract.

48. Defendants contended that approximately \$8,000-\$10,000 was erroneously charged against Construction for "yard work," i.e. work such as maintenance performed in the contractor's construction yard as opposed to on the job site. (Tr. VIII, 252), not covered under contract. The parties specifically referred to contracts with the Michigan Roadbuilders Association, the Underground Association, and the Associated General Contractors. The 1980-1983 agreement for the Roadbuilders defines covered work as including all workmen coming within the jurisdiction of the Union, as set

forth in Exhibit A. That exhibit, p. 43, refers to "GENERAL LABORERS--- All laborers in ... material years... and all laborers' work of an unskilled and semi-skilled character." Yard work is clearly included in this contract. The 1980-1983 Underground agreement (Ex. D7) provides that "work" means any work performed by [the] contractor coming within the jurisdiction of the union and "workmen" includes all classes of laborers working in any classification covered under the agreement. The agreement makes no reference to yard work of any kind, but does refer to "construction laborer." The same is true of the AGC contracts. Further, there was evidence that "yard work" would not be covered under certain of the agreements. The Court believes that the parties have not sufficiently briefed the issue of whether so-called "yard work" is included in these two contracts. The parties are directed to brief the issue,

pointing to the specific language in specific contracts, and supported by specific transcript references, to support their claim that "yard work" is/not covered under a particular contract. Briefs must be submitted within 30 days from receipt of this opinion.

49. The question of WPM's identity or separateness from Inc. was another hotly contested issue. The evidence on this point sometimes conflicted. As noted above, WPM was formed in 1978 by Leoni, Sr.'s three sons. It frequently joint ventures with Cliff's United Development, a minority-owned contractor, thus meeting state highway requirements for minority participation in state contracts. (Tr. IX, 49; Tr. III, 19-21). Bill Leoni, Jr. is president of WPM; he is also a full-time employee of Inc. (Tr. VI, 7). WPM's office is a trailer at 2277 Grand Blanc Road, which is the location of the Grand Blanc Landfill, owned by the

William H. Leoni, Inc. company. (Tr. IX, 45-46; Tr. III, 18). WPM is listed separately in the Rankin phone directory. (Tr. IX, 20). However, all calls made to WPM's office are referred to Inc.'s Torrey Road address, as that is where Leoni, Jr. is employed. Leoni Jr.'s secretary, employed by WPM is physically stationed at Inc.'s offices. WPM receives mail at its Grand Blanc office; from there it is transported to Inc.'s office. (Tr. IX, 46). WPM does not use Rogers; computer for its payroll, although Mrs. Morton has occasionally prepared WPM's payroll. (Tr. III, 23; Tr. VI, 13). WPM does not pay rent to Inc. for the space it occupies.

50. Leoni, Jr. has the qualifications and experience necessary to operate a small contracting business such as WPM. (Tr. VIII, 192-193, 231). He signs all insurance and bonding contracts, promissory notes, and is solely obligated on bank lines of credit.

(Tr. IX, 17-18; Ex. A6, C6, O6, Z6). WPM has separate corporate records and keeps separate books. (Ex. W). WPM's stationary shows its address as 2277 Grand Blanc Road and also lists the Rankin number as its phone numbers. (Ex. D6). All bids and contracts are prepared and signed by Bill Leoni, Jr. for WPM. (Exs. E6-I-6, N6-P6). All official communications and contracts are addressed to WPM at its Grand Blanc Road address. (Tr. IX, 21). WPM is prequalified by the state separately from any of the other Rogers companies. (Ex. J6-M6). WPM was a creditor of Construction and/or Excavating, and voted on acceptance of the reorganization plan just like any other creditor. (Ex. B6). WPM is separately licensed by the City of Flint, is separately rated by the MESC and the State Department of Civil Rights. (Exc. T5, U5, X5).

51. Leoni, Jr. has occasionally asked his father for advice, and Mrs. Leoni is

authorized to sign corporate checks, although it is not common practice for her to do so. (Tr. IX, 33-34, 36-37).

52. Cross-examination of Bill Leoni, Jr. revealed several areas in which the separation between WPM and Inc. is not so clear-cut. For instance, in 1983, WPM subcontracted 50-60% of its jobs--or six out of ten or twelve--back to Inc. Further, WPM has never bid against Inc.; Bill Leoni, Jr. testified that this lack of competitive bidding between the two companies was probably due to Inc.'s lack of interest in jobs WPM would likely bid on. (Tr, IX, 39-43). This assertion is undercut by the large percentage of jobs subcontracted to Inc. after being awarded to WPM.

53. WPM has been a non-union contractor until recently; it does not pay fringe benefits to the trust funds, but makes a cash payment for fringes directly to the men. (Tr. IX, 50-51). Gerry Hall, the

business agent for the Flint Laborers union, has frequently tried to "sign-up" WPM as a union contractor. Hall testified that he approached Leoni, Sr. about WPM, but was told by him that he couldn't sign for WPM as he was not an officer, and would have to talk to Bill Leoni, Jr. When he thus approached Bill, Jr. he purportedly told Hall that his dad called the shots for WPM. (Tr. IV, 21-23; Tr. V, 16). Since that conversation, Hall has spoken to Bill, Jr. only once about WPM.

54. Hall testified that his men frequently don't know who they are working for--Inc. or WPM--until they receive their paycheck (Tr. IV, 26-27). This testimony was contradicted by other evidence, however, that the men do indeed know which company they are working for. (Tr. VIII, 161, 166). Hall becomes aware that WPL has been awarded a job through the bi-weekly Dodge reports circulated through the construction industry

or when one of his men reports that he has received a WPM paycheck.

55. Hall also testified that, on the occasions when he has tried to get WPM to sign a collective bargaining agreement, that leoni, Sr. has always responded that he would subcontract the job to Inc. rather than allow WPM to be shut down by pickets. (Tr. IV, 26). The men then receive Inc. paychecks.

56. Hall conceded, however, that he did not believe WPM was established primarily to avoid payment of fringe benefits, that it was not a typical "scam" or double-breasted contract which pays much less than union scale. WPM does in fact pay union scale wages. (Tr. V, 33-39-40). Hall also conceded that non-union contractors frequently subcontract to union contractors to avoid a strike. (Tr. V, 39). At least prior to trial, Hall also believed that WPM and Inc. were separate companies (Tr. V,

40), admitted that he had never seen Leoni, Sr. on a WPM job site, and at the time of trial, believed Bill, Jr. ran WPM (Tr. X, 187).

57. There was evidence that Bill, Jr. controls labor relations and management for WPM. (Tr. VIII, 156). WPM frequently hires employees laid off from other contractors, including Inc. Similarly, WPM's employees are frequently hired by Cliff's United Development, as Cliff's does not have employees of its own. This is a common practice in the construction industry. (Tr. III, 23; Tr. VIII, 129, 173, 177-178-221). Leoni, Jr. could see no conflict of interest in hiring for WPM an employee already working for Inc. (Tr. IX, 53-54). The Court initially regarded this assertion with skepticism; however, as it appears that such shifting of personnel is a readily accepted practice, the Court does not find the general transfers of employees between WPM

and Inc. to be tainted. The employees receive separate W-2s from Inc., WPM and Cliff's, although they do not always fill out new withholding forms. (Tr. VIII, 131, 139-140, 165, 168-169). WPM frequently leases its equipment from various equipment suppliers or contractors, including Inc. This, too, is a common practice in the construction industry. (Tr. VIII, 132, 137-138, Tr. IX, 66).

58. It is also important to note the failure to produce certain material evidence. Plaintiffs initially contemplated producing expert testimony of their own on the issue of WPM's status vis-a-vis the other corporations and to establish their theory that WPM is the alter ego of the new Inc. (Tr. IX, 189). No such expert testimony was produced. Further, plaintiffs have had broad access to WPM's corporate and business records through discovery. (See, e.g., pleading No. 36). No evidence was

presented of commingling of assets or funds between Inc. and WPM, or that Leoni, Sr. in any way had utilized or diverted such assets to his own, or to Inc.'s, benefit. Evidence that WPM is operated by bill, Jr. partially at Inc.'s offices, that WPM pays no rent, and that Inc. office employees sometimes perform clerical services for WPM are minor irregularities. In fact, no evidence of gross irregularity in the conduct of WPM's business was presented, except the testimony of Mr. Hall regarding Leoni, Sr.'s "calling the shots" for WPM, and his testimony that the men did not know which company they were working for. As previously noted, this last assertion was contradicted by the credible testimony of Mr. Baumann. While the Court finds Mr. Hall generally to be a credible witness, the weight of the evidence simply does not support the conclusion that WPM is merely a shell corporation directed by Mr. Leoni, Sr. with Bill, Jr. acting solely as

a figurehead. There was no evidence, for example, that the sub-contracts between WPM and Inc. were not valid subcontracts or that WPM is not treated by relevant financial institutions and state authorities as a separate entity. The Court is compelled to conclude that WPM is a separately functioning company from Inc., in its financial, business and personnel affairs.

59. Plaintiff trust funds may accept employer contributions only if there is a current signed collective bargaining agreement between the employer and the union. (See, e.g., Ex. 76, Mich. Carp. Council Health & Welfare Fund Decl. of Trust, Article V, § 1(a); 11-28-83, Tr., 68). The collective bargaining agreements upon which plaintiffs rely uniformly incorporate, either explicitly or by reference, the terms of the various trust agreements setting up the various plaintiff trust funds. Many of the contracts

specifically state that the employer agrees to be bound by the penalty provisions of such declarations and agreements of trust. The trust agreements uniformly authorize the trustees to impose reasonable assessments upon employers delinquent in their contributions. The Court specifically finds an adequate contractual basis for the imposition in this case of late payment assessments and audit assessments upon defendants.

60. None of the contracts on which plaintiffs rely contains a so-called "successorship" clause, binding an employers successors and assigns to the substantive provisions of the agreements.

Conclusions of Law

61. The Court has jurisdiction over this matter pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and 29 U.S.C. § 1132 of the Employment Retirement Income Security Act. (ERISA).

62. Plaintiffs, as trustees of the fringe benefit funds, have standing to sue to enforce the contributory provisions of the pertinent collective bargaining agreements. Audit Services, Inc. v. Rolfson, 641 F. 2d 757 (9th Cir. 1981); Allen v. McWilliams Electric Co., Inc., 494 F. Supp. 53 (N.D. Ill, 1980).

63. Plaintiffs rely on the single employer, alter ego, and successor theories of corporate entities in claiming that Construction, Excavating, Inc., Rogers-Cooper, and WPM are jointly liable for the unpaid contributions and related assessments. Additionally, plaintiffs seek to hold Leoni individually liable under a theory of corporate veil piercing. The Court agrees that Inc., Construction and Excavating are jointly liable, but finds no basis for imposing liability on defendants Rogers-Cooper, WPM, or Leoni, and accordingly dismisses the complaint as to

the latter three persons.

64. The single employer doctrine is a theory which allows two or more entities to be considered as one employer. Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F. 2d 489, 504-505 (5th Cir. 1982). Single employer status ultimately depends on "all the circumstances of the case," and is characterized as an absence of an "arms-length relationship found among unintegrated companies." Local 627, International Union of operating Engineers v. N.L.R.B., 518, F.2d 1040, 1045 (D.C. Cir. 1975). However, a finding of single employers status does not mean that the various entities will be bound to the contracts signed by on;y one of the companies. Rather, contractual liability will be imposed only if the employees of the various entities are found to constitute a single bargaining unit. Carpenters Local Union No. 1846 v. Pratt-Farnsworth, supra at

505. This latter issue was not tried to the Court, and accordingly, the single employer theory is inapplicable to the instant dispute.

65. More difficult issues are presented by the claims of alter-ego and successor corporations. Plaintiffs claim that Construction and Excavating were alter-egos of each other, and that the new Inc. is the alter-ego and successor of the two now-inactive corporations. Alter-ego issues commonly arise in successorship situations when ownership of a signatory company changes hands. Although a bona fide successor is not, in general, bound by a prior collective bargaining agreement, an alter-ego will be so bound. N.L.R.B. v. Tricor Products, Inc., 636 F.2d 266 (10th Cir. 1980). There is no "hard and fast rule" to determine whether two companies are alter-egos; however, relevant factors include continuity of workforce, equipment,

management, ownership, business, customers, and the like. Tricor, supra; Service, Hospital, Nursing Home and Public Employees Union Local No. 47 v. Commercial Property Service, Inc., 755 F.2d 499 (6th Cir. 1985); Fugazy Continental Corp. v. N.L.R.B., 725 F.2d 1416 (D.C. Cir. 1984); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, supra at 507. The focus of the alter-ego theory in the context of "successor" corporations is whether the new entity is a disguised continuance of the old company, viewed from the perspective of the employees. General Teamsters, Chauffers, and Helpers, Local Union No. 249 v. Bill's Trucking, 493 F.2d 956 (3rd Cir. 1974).

66. Construction and Excavating were not, and are not, alter ego corporations, but were functionally distinct operations. Neither corporation was established or maintained in order to evade collective bargaining obligations, as both companies

regularly contracted with various unions. Although they shared common ownership by the Leonis, they had separate employees, customers, business purpose, and financial affairs. Although Leoni retained ultimate control, as indicated by his decision to cease payment of fringe benefit contributions for all companies, he did not exercise day-to-day supervisory or management responsibilities over Excavating, but only over Construction. Interchange of equipment and personnel was infrequent, and, in the context of the scale of business conducted by the two companies, were actively insignificant. The occasional confusion of fringe benefit payments, not always due to the fault of the Rogers' personnel, does, as the Court earlier noted, indicate that matters were not always meticulously kept separate. However, the evidence as a whole indicates that the two businesses were functionally separate

entities, and were treated as such in their financial and labor relations matters.

67. Inc., however, cannot be regarded as other than the alter ego of the two now dormant corporations, Excavating and Construction. The Court has no doubt that Inc. was not formed to circumvent collective bargaining agreements or to evade payment of fringe benefit contributions. It is clear that Inc. was formed for legitimate business purposes untainted by any hint of fraud or mis-dealing with any of the creditors of the two companies. Nonetheless, the fact remains that Inc. simply picked up where Construction and Excavating left off, utilizing the same personnel, equipment, supervision, serving the same customers and performing the same contracts as Construction and Excavating had been doing before May 1980. That the new Inc. was solely owned by Joanne Leoni did not effectuate a bona fide change in ownership.

One day the employees were working for the two old companies, operating under the aegis of the state court reorganization, the next day they were employed by a new corporate entity, Inc. From their perspective, their jobs had not changed one iota, except for the receipt of new paychecks with their previous withholds "zeroed out." Although the employees were aware of the change in corporate structure, or were made aware as soon as was thereafter feasible, they did not understand that this change meant a substantive difference in their terms of employment. A very substantial, virtually identical, continuity of the business enterprises constituting Excavating and Construction was maintained as a result of Inc.'s incorporation. Under these circumstances, the Court must find Inc. to be the alter ego of the two old companies. N.L.R.B. v. Tricor Products Inc., supra; Carpenters Local Union No. 1846 v. Pratt-

Farnsworth.

68. It has frequently been stated that an alter ego finding must rest upon a finding of anti-union animus or an attempt to surreptitiously evade contractual obligations. See, e.g., In re Plaza Mission Bottling Co., 14 B.R. 428 (E.D.N.Y. 1981). This requirement has been questioned, however, and it is now doubtful whether anti-union animus is a sine qua non of alter ego status. Fugazy Continental Corp. v. N.L.R.B., supra at 1419 ("substantial weight" to be given to motive for creation of new company); Alkire v. N.L.R.B., 716 F.2d 1014 (4th Cir. 1983); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, supra at 508 (focus of alter ego doctrine is on disguised continuance of old employer or attempt to avoid obligations of contract); N.L.R.B. v. Tricor, supra at 270 (anti-union animus merely one factor to be considered). The Court has previously observed that anti-

union animus played no role in the creation of Inc.; this factor is outweighed by the identity of operations carried over from the old companies, however.

69. With the foregoing in mind, the Court also concludes that WPM is not at alter ego either of Excavating and/or Construction or of Inc. It is a separately owned, managed, and functioning entity. It was not formed to evade contractual obligations with the unions, and it is not a shell corporation managed by the secret hand of Leoni, Sr. It is what it purports to be, a company owned and run by the three Leoni sons. Alter ego liability may not be predicated merely because separate members of the same family own separate businesses with similar business purposes. Having shown neither contractual nor alter ego liability with respect to WPM, the complaint is hereby dismissed with respect to that defendant.

70. No basis for liability has been shown

with respect to defendant Rogers-Cooper. No contract has been established between that entity and the unions, although standard practice would require the unions to obtain a separate collective bargaining agreement with the joint venture itself. Liability for fringe benefit contributions cannot arise apart from a written agreement. Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 589 F. Supp. 1061 (M.D. Tenn. 1984); 29 U.S.C. § 186(c)(5)(B).

71. The facts show that Rogers-Cooper was a separately functioning entity from the other defendants. The so-called Maloblocki agreement does not bind Rogers-Cooper or Construction as Maloblocki was without authority to execute such agreement. 2A C.J.S. Agency, § 166, pp. 809-810 ("Limitations of authority are operative as against those who have, or are charged with, knowledge of them. Such persons cannot

claim to have been misled into reliance on a more extensive authority..."); Id., § 172, pp. 823-824 ("It is generally held that a special agent, having authority only with respect to a specific and limited act, transaction or purpose can only affect the rights and/or status of the principal within the limits of the authority conferred, and that third persons dealing with such an agent must investigate and ascertain the limits of his authority."); Jackson v. Goodman, 244 N.W.2d 423 (Mich. App. 1976) (in determining scope of authority, may consider custom of similar businesses at same time and place). Ratification is not shown merely by the payment of fringe benefits under the requirement of certified payrolls. The complaint is hereby dismissed as to Rogers-Cooper.

72. No basis of liability has been shown with respect to William H. Leoni individually. No contract has been executed

between the unions and Leoni, and the Court does not find this to be an appropriate case in which to "pierce the corporate veil." A corporation's legal identity may be disregarded if the corporation is used to justify wrong, protect fraud, or avoid legal obligations. Solomon v. Western Hills Development Co., 21 N.W. 2d 428 (Mich. App. 1981); Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979). There was undoubtedly a "degree of informality" in the operation of the Rogers companies. However, there was no evidence that any of the corporations was other than a legitimate business entity, no evidence of undercapitalization of Construction, Excavating, or Inc., and no evidence of improper commingling of personal with corporate funds. Under these circumstances, it is inappropriate to hold Leoni personally liable for the debts of the corporations. Solomon v. Western Hills Development Co.,

supra; Seymour v. Hull & Moreland Engineering, supra. The complaint is hereby dismissed as to defendant Leoni.

73. The rollover provisions in the various contracts are enforceable against defendants. No evidence was produced that notice of termination by certified mail was given to the unions, as required by the contract language. Central States Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc., 472 F.Supp. 1243 (E.D. Mich. 1979). Steinmetz Electrical Contractors Association v. Local Union No. 58 International Brotherhood o Electrical Worker, AFL-CIO, 517 F.Supp. 428 (E.D. Mich. 1981), cited by defendants, is inapt. That case did not deal with a specific contractual provision continuing the contract in the absence of specific termination by the contractor.

74. Defendants Excavating and Construction resigned from the Michigan

Roadbuilders Association in August 1978. This would constitute sufficient termination of any subsequent agreement reached between the Roadbuilders and the unions, as the definition of a "contractor" covered by the agreement means one that is a member of the Roadbuilders Association. (Ex. F7, Article II, V4, paragraph 1). However, defendants Construction and Excavating signed new agreements reached under the auspices of the Roadbuilders on November 17, 1980. This reestablishes contractual liability for agreements reached by the Roadbuilders. Contrast, Trustees of Colorado Pipe Industry insurance Fund v. LPCC, Inc., 549 F.Supp. 833 (D. Colo 1982).

75. The Court finds no competent evidence of intent to modify the provisions of the contracts. It is undisputed that, aside from the 1978 resignation from the Roadbuilders association, no written notice of termination was ever given to the unions.

The only evidence of "modification" or "termination" of the contracts was that some business agents make a practice of obtaining signed master agreements from each contractor at the beginning of each contract period. (See, e.g., Ex. S). This, in itself, does not indicate sufficient intent to modify the provisions of the original contract such that the Court should infer that such contracts were terminated. Contrast, Pullman, Inc. v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths Forgers and Helpers, AFL-CIO, 354 F.Supp. 496 (E.D. Pa. 1972) (various letters between union and employer indicating intent to modify contract).

76. In its February 6, 1984 opinion, the Court held that the six-year Michigan statute of limitations, Mich. Comp. Laws Ann. § 600.5807(8), was tolled between July 9, 1979 and June 27, 1980 as a result of an

injunction issued by Judge McAra prohibiting all creditors of the Rogers companies from pursuing their remedies against defendants. The Court believes that ruling was in error. Plaintiffs were not precluded from pursuing their federally created in personam claims under ERISA by the state court injunction. In fact, plaintiffs were advised by their attorneys that they could pursue their federal remedies notwithstanding the circuit court injunction. (Tr. X, 119-120). Old Security Life Insurance Company v. Continental Illinois Bank and Trust Co. 740 F.2d 1384, 1394 (7th Cir. 1984); Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co., 600 F.2d 671 (7th Cir. 1979); Appeal of Coburn Leasing Co., 54 Mich. App. 228 (1974). Also see General Atomic Co. v. Felter, 98 S.Ct. 76, 78 (1977) ("[i]t is therefore clear... that the rights conferred by Congress to bring in personam actions in

federal courts are not subject to abridgement by state-court injunctions, regardless of whether the federal litigation is pending or prospective.") Therefore, all claims accruing more than six years from the date of filing of the complaint in this matter, without taking into account the circuit court injunction, are time-barred. Defendants' claims for credit on account of contributions made under mistake are also barred to the extent more than one year from the date of contribution has passed. 29 U.S.C. § 1103(c)(2)(A). Teamsters Local 639--Employers Health Trust v. Cassidy Trucking Inc., 646 F.2d 865 (4th Cir. 1981).

77. 29 U.S.C. § 1132(g)(2) provides that, in any case where a judgment is awarded to a trust fund for delinquent contributions under 29 U.S.C. § 1145; the Court shall award the plan,

- (A) the unpaid contributions,
- (B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions,
or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A).

The language of the statute is mandatory.

Greater Kansas City Laborers Pensions Fund

b. Thummel, 738 F.2d 926 (8th Cir. 1984).

Thus, the Court directs the parties to submit a proposed order of judgment for the delinquent contributions, interest calculated in accordance with 29 U.S.C. § 1132(g)(2), an amount calculated in accordance with 29 U.S.C. § 1132(g)(2)(C), and audit costs.

A brief word is in order about the amount of liquidated damages to which plaintiffs are entitled. Plaintiffs' Exhibit 63, summarizing the amounts they initially claimed to be due, stated that there were

delinquencies in the amount of \$187,963,73, and liquidated damages in the amount of \$284,594. Thus, the liquidated damages would amount to roughly 150% of the delinquencies. Such an amount is in excess of that permitted by statute. Liquidated damages, including audit assessments, may not exceed 20% of the delinquent contributions owed. I.A.M. National Pension Fund Benefit Plan A v. Monal Manufacturing Co., 607 F.Supp. 512 (D.C. D.C. 1985); also see, Doolan v. Doolan Steel Corp., 591 F.Supp. 1506 (E.D. Pa. 1984). The proposed order shall reflect an award of liquidated damages equal to 20% of the delinquencies found to be owed, if greater than the interest calculated under 29 U.S.C. § 1132(g)(2)(C).

78. In these findings of fact and conclusions of law the Court has not attempted to determine exactly how much is owing by whom, nor which particular

contracts are binding upon which company, except where absolutely necessary. The Court believes that the parties themselves can work out the particulars. Some recalculation of amounts due and owing will be necessary in light of some of the Court's rulings. If the parties cannot work out the particulars of the judgment to be entered, and certain specific questions remain about the Court's rulings, the parties are to itemize their questions, supported by specific transcript reference where possible, and present same to the Court for resolution.

79. Accordingly, the parties are directed to present to the Court two itemized statements of damages, interest, liquidated damages, etc., pursuant to the Court's findings of fact and conclusions of law and 29 U.S.C. § 1132(g)(2) within 90 days for entry. One statement is to include disputed yard work, and one statement is to exclude

it. The Court has already ruled that yard work is covered under the Roadbuilders agreement. Plaintiffs may make a motion for attorney fees, as such an award is also mandatory under the statute. Defendants will, of course, be allowed to contest plaintiffs' request for fees, with the ultimate award to be made by the Court, after considering both parties' contentions on the issue.

80. Defendants' motion for dismissal, Fed. R. Civ. P. 41(b), is granted in the following respects: the complaint is dismissed in its entirety with respect to defendants WPM, William H. Leoni, and C.J. Rogers-Cooper. Count II of the complaint was previously dismissed by the Court in its opinion of February 6, 1984. Count III is dismissed as to all defendants. In all other respects, defendants' motion for dismissal is DENIED.

The Court is empowered, pursuant to 29

U.S.C. §§ 1132(g)(2)(E), to order such other legal or equitable relief as the Court deems appropriate. The Court will retain jurisdiction of the case in order to maintain the preliminary injunctive order previously entered on August 5, 1983 (effective July 1, 1983), or until further order of the Court.

Conclusion

The Court finds for plaintiffs on Counts I, IV and V. Count III is dismissed as to all defendants. The complaint is dismissed in its entirety as to defendants WPM, Inc., C.J. Rogers-Cooper, and William H. Leoni. The parties are to submit briefs on the issue of "yard work" within thirty days. The parties are to submit proposed orders of judgment within ninety days.

Wendell A. Miles, Chief Judge

Dated: November 20, 1985

Footnotes

1/ By agreement, the parties referred to Charles J. Rogers Construction Company as "Construction;" C.J. Rogers, Inc. as "Inc.;" Chas J. Rogers Excavating, Inc. as "Excavating" and C.J. Rogers-Cooper as "Rogers-Cooper." Throughout this opinion, the Court will abide by this convention, except as necessary.

2/ Plaintiffs' exhibits were given Arabic numerals. Defendants' exhibits were lettered A-Z; however, defendants' exhibits were so numerous as to require identification as A2-Z2, A3-Z3, A4-Z4 and so on.

3/ The original documents of incorporation are not included in Ex. 67, thus the Court cannot identify the precise date of incorporation.

4/ Charles Rogers was, before his death, William H. Leoni's father-in-law. Rogers' daughter, Joanne Leoni, is Leoni's wife.

5/ Transcript references will be identified by volume and page number. Thus, the immediate reference is to Volume IX, pages 6-9.

6/ The corporate books of Construction show that Leoni had been a director of Construction at least since 1964. He became a director of Excavating in 1974.

7/ William Martz and his deceased father Lyle Martz were the corporate attorneys for Construction and Excavating. At trial plaintiffs stipulated that Martz, Robert Solner, attorney for Inc., and Robert Kotz, attorney for the Oversight Committee, were expert witnesses in the area of corporate law. (Tr. X, 374).

8/ Exhibits M4-U4, Excavating's financial statements for this period, were admitted into evidence by the Court;s order of August 30, 1984. Additionally, any of defendant's exhibits, specifically Y, Z, A2-V2, J4-V4, were not formally admitted at trial. Plaintiffs' counsel had no objection to the bulk of these exhibits and was instructed by the Court to formalize his objections to particular exhibits in a written memorandum (Tr. IX, 140, 185). This plaintiff's counsel did. As no objections were made to the remaining exhibits, the Court now formally receives them into evidence as a part of the record.

9/ Rene Ortleib represented Construction and Excavating in the circuit court reorganization which ensued and in the lawsuit against Michigan National Bank.

10/ Solner initially incorporated Inc. under the name of "CJR, Inc." Amended articles were later filed changing the name to "C.J. Rogers, inc."

11/ The Court finds the assets to have been fairly appraised by professional appraisers. (Exs. H2-J2). The Court agrees with Solner that the sale was an arms-length transaction. (Solner Dep., 9-23-83, 22-23).

12/ The minute books of Inc. state that "upon incorporation the note payable--officer was paid." In actuality, the note was paid off during the month-long period ending in May 1980. However, the corporate law experts, Kotz and Solner, agreed that this statement was not misleading when considered in light of other documents contained in the minute book, such as the subscription agreement and the consent to

corporate action. (Solner Dep., 2-10-84, 27-28; Kotz Dep., 69-71, 76-78). Also see, Mich. Comp. Laws Ann. § 450.1306: "A subscription...shall be paid...in such installments and at such times as shall be determined by the board."

13/ According to Martz, Excavating was solvent but not liquid. Thus, the pledging by Mrs. Leoni of the two notes would not have destroyed the transaction for failure of consideration. (Martz Dep., 43-45). Solner also testified that Excavating would have been able to pay off the notes had they been demanded because of the accounts receivable, which totalled a not inconsiderable sum. (Solner Dep., 2-10-84, 47; Also see Tr. IX, 169).

14/ No objections to the hearsay nature of some of this testimony were made, and the Court considers any objection to have been waived.

15/ That Ortleib, an officer of the court, made this statement, lends further support to the conclusion that it was an innocent, not calculated, misrepresentation.

16/ Certified payrolls are required as a condition of public works contracts and required that prevailing wages and fringe benefits be paid. (Tr. I, 47).

17/ With respect to the informality permissible for corporate meetings under Michigan law, see Mich. Comp. Laws Ann. § 450.1521, allowing for corporate board meetings by telephone. Also see Solner Dep., 9-23-83, 54-55 (corporate meetings on;y held when necessary).

18/ There was evidence that Leoni at times

personally advanced funds to meet payroll obligations for Construction on a 1976 job in Nebraska. (Tr. III, 4-5; Ex. 35). Promissory notes were issued for those obligations by Construction, at interest rates varying from "1 $\frac{1}{2}$ %/Pr" to 8-1/2%. The meaning of "1 $\frac{1}{2}$ %/Pr" was not explained, although it may indicate "1 $\frac{1}{2}$ % over prime." In any case, the promissory notes for interest indicate that the transactions were legitimate loan transactions. The Court has found no evidence indicating that Leoni treated the company's funds as his own to be used for personal purposes.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN CARPENTERS COUNCIL
HEALTH AND WELFARE FUND,
et al.,

Plaintiffs,

No. G83-582 CA5

v.

OPINION AND ORDER

CHARLES J. ROGERS CONSTRUCTION
CO., et al.,

Defendant.

I. Introduction

This matter, an action to collect arrearages and to compel defendants to keep current on contributions to plaintiff trust funds pursuant to section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 and the Employee Retirement Income Security Act, (ERISA), 29 U.S.C. § 1001, et seq., was tried to the Court for thirteen non-consecutive days, beginning on September 26, 1983 and concluding almost one year later on September 7, 1984. The Court rendered its findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a) on

November 20, 1985, in which it found for plaintiffs on Counts I, IV and V of the complaint, dismissed Court III as to all defendants and dismissed the complaint in its entirety as to defendants W.P.M., Inc., C.J. Rogers-Cooper and William H. Leoni. In addition, the parties were ordered to submit briefs on the issue of yard work and proposed orders of judgment. As both parties have submitted proposed judgments and objections attendant thereto, the Court will now consider the issue of damages.

This opinion is entered so that the Court's resolution of the issues contested by the parties as to the judgment may be clarified.

II. Amount of Judgment

Plaintiffs submit to the Court through their proposed judgment and supporting exhibits that the amount of unpaid contributions owed by defendants Charles J. Rogers Construction, et al. is \$119,016.02.

While this amount would seem to be otherwise correct, the Court notes that \$4,434.63 of this figure has been charged for work that would have been performed under the Michigan Roadbuilders Agreement between August 1978 and November 1980. Since the Court found in conclusion of law No. 74 that defendants Charles J. Rogers Excavating Co. and Charles J. Rogers Construction Co. had resigned from the Michigan Roadbuilders Association during this period, they would have been under no obligation to contribute to plaintiff trust funds for work performed under the Roadbuilders contract. Therefore, plaintiffs' proposed figure representing unpaid contributions will be reduced by \$4,434.63.

The Court is also concerned that plaintiffs' proposed figure reflects amounts charged for "year work" completed which was non-job site related. In the memorandum opinion of July 16, 1987, the Court found

that job site related yard work was indeed included under the Associated Underground Contractors (AUC) Contract and the Associated General Contractors (AGC) contract. However, because the Court was unable to ascertain the amount of non-job site related work performed, the parties were directed to perform the necessary calculations on the issue of yard work and submit the final calculations to the Court to be taken into account in entering the judgment. While plaintiff has failed to supply any figures on the yard work issue, defendants have indicated in their objections to plaintiffs' proposed judgment that the parties have agreed that the amount of contributions for non-job site related work was \$13,676.71. As it appears that plaintiffs' figure of unpaid contributions is submitted exclusive of any reduction for the non-job site related yard work, the Court will deduct from that amount

\$13,676.71. Accordingly, the Court finds that the amount of unpaid contributions due plaintiffs from defendants, excluding non-job site related contributions and certain amounts incurred under the Roadbuilders agreement between August 1978 and November 1980 is \$100,904.68. Additionally, plaintiffs are awarded prejudgment interest on the unpaid contributions in the amount of \$96,643.56, as calculated at the prescribed rate under 26 U.S.C. § 6621.¹

The Court is obligated under 29 U.S.C. § 1132(g) (1)(C) to award to the plaintiffs an additional amount equal to the greater of liquidated damages provided for under the plan in an amount not to exceed twenty percent of the unpaid contributions or interest on the unpaid contributions. In this case, the interest on the unpaid contributions is the greater amount. However, defendants claim that liquidated damages rather than interest should be

awarded to the plaintiffs since they sought liquidated damages in their complaint rather than interest. The Court finds this argument to be without merit. A plaintiff is not limited to the relief requested in his complaint. Fed. R. Civ. P. 54(c) clearly states that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the part has not demanded such relief in his pleadings." Thus it is immaterial that the plaintiffs did not request an award of double interest in their complaint. United States v. Maryland Casualty Company, 384 F. 2d 303, 304 (2d Cir. 1967). Rather, the relevant inquiry is whether the relief is appropriate under the proof presented. O'Hare v. General Marine Transport Corp., 740 F.2d 160, 171 (2d Cir. 1984), cert. denied, 105 S. Ct. 1181-82, 84 L.Ed. 2d 329 (1985); Fast v. School Distr. of City of Ladue, 728 F.2d 1030, 1033 (8th Cir. 1984).

Here there can be no doubt that an award of double interest is appropriate, as the application of this section is mandatory. Operating Engineers Pension Trust v. Beck Engineering & Surveying, 746 F.2d 557 (9th Cir. 1984). Further, the Court observes that the defendants were given sufficient notice of the double interest provision by plaintiff's complaint. Paragraph one of the complaint states that jurisdiction of this action is based on 29 U.S.C. § 1132, a brief review of which would give defendants adequate notice of the remedies available to plaintiffs. O'Hare, supra, at 171; Trustees of Amalgamated insurance Fund v. Geltman, 784 F.2d 926 (9th Cir. 1986); East Girard Savings Association v. Citizens National Bank and Trust Company of Baytown, 593 F.2d 598 (5th Cir. 1979). Finally, plaintiffs request for "such other legal or equitable relief as the Court deems appropriate" in paragraph 29 of the complaint would

certainly encompass the type of relief statutorily mandated under section 1132(g)(2)(C). Therefore, plaintiffs will be awarded the amount of \$96,643.56 under the double interest provision of 29 U.S.C. § 1132(g)(2)(C)(i).

III. Attorney Fees and Costs

The next element of the judgment that the Court must address is attorney fees and costs. Under section 1132(g) an award of attorney fees is both mandatory and discretionary. The Court may award either party "a reasonable attorney's fee and costs" in its discretion under section 1132(g)(1), but it must award "reasonable attorney's fees and costs" in an action under Title 29 by a fiduciary "in which a judgment in favor of the plan is awarded," under section 1132(g)(2)(D). Thus, because the language of section 1132(g)(2)(D) is mandatory, the Court must award a reasonable attorney fee and costs to plaintiff trust

funds as they were successful in this action to recover delinquent contributions. Operating Engineers Pension Trust, supra, at 1508; Geltman, supra, at 931; Carpenters Amended and Restated Health Benefit Fund v. John W. Ryan Construction Co., 767 F.2d 1170 (5th Cir. 1985); Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co., 522 F.Supp. 919 (E.D. Mich. 1981).

A. Plaintiffs' Attorneys' Fees and Costs

In support of the application for attorney fees and costs, plaintiffs' counsel has submitted a statement of hours which sets forth by individual entries the date on which work was performed, a brief description of what was done by the attorney and the amount of time expended. Also included in the statement is a memorandum of costs and disbursements setting forth particular expenses which plaintiffs seek to have as costs. The hours incurred by Mr.

Freeberg and Mr. Horton are listed separately, with Mr. Freeberg claiming 474.24 hours and Mr. Horton claiming 169.0 hours respectively. The entries set forth for Mr. Freeberg indicate that he performed work in this matter from November of 1982 until the end of 1987. Mr. Horton's hours only indicate work performed in 1983. Defendant has raised several objections to the attorney fees and costs sought by plaintiff.

The most appropriate starting point for any award of attorney's fees is the determination of a reasonable hourly rate and the number of hours reasonably expended on the litigation. Hensley v. Eckerhard, 461 U.S. 424, 103 S.Ct. 1933 (1983); United Slate, Tile and Composition Roofers v. G & M Roofing, 732 F.2d 495 (6th Cir. 1984); Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980). The product of these two

figures, often referred to as the "lodestar," is the figure used to make an initial estimate of the value of a lawyer's services. Hensley, 461 U.S. at 433, 103 S. Ct. at 1939. After reviewing a request for attorney fees, the district court may reduce the hours claimed where it finds that such hours were not "reasonably expended." Id. This encompasses hours which are duplicative, excessive, redundant or unnecessary. Id. See Brinegar, 671 F.Supp. 381 (M.D.N.C. 1987).

While the district court may exercise its discretion in determining the proper amount of attorney fees to be awarded, the burden of proving that the hours expended and the fee charged are reasonable is upon the party seeking the award. Hensley, supra, 461 U.S. at 437, 103 S.Ct. at 1941. That is, the fee applicant must sufficiently document the hours reasonably expended and must also exercise "billing judgment" in order to

eliminate any hours which would not be appropriately billed to a fee paying client. Id. 461 U.S. at 434, 103 S.Ct. at 1940. Furthermore, the district court must exercise its own independent billing judgment to determine that the party seeking the has sufficiently documented its claim and that the hours incurred in support of the claim are reasonable. See United Slate, supra, 732 F.2d at 502; Davidson v. Cook, 594 F.Supp. 418, 424 (E.D. Va. 1984).

1. Hours reasonably expended

Defendants have raised several objections to the amount of the fee sought by plaintiffs. These objections basically address the reasonableness of the number of hours spent by plaintiffs' attorneys. At the outset, the Court notes that the 643.25 hours claimed by plaintiffs' attorneys is not an incredible amount of time spent on this matter, given the fact that this litigation has spanned a period of five

years. However, even if the number of hours is not facially unreasonable, the Court must review the hours claimed in light of defendants' objections to ensure that such hours are reasonable.

Defendants first assert that plaintiffs' proposed attorney fee is unreasonable because it attempts to charge defendants for the work of two attorneys. Specifically, defendants point to the fact that some of the billings were for trial time spent by Mr. Horton and Mr. Freeberg, but that the trial of this case was conducted only by Mr. Horton, at least through 1983. Here the Court notes that while attorney fees may not be awarded for hours which are duplicative or redundant, an award of attorney fees is not limited to one attorney per case. Todd Shipyards Corp. v. Turbine Services, Inc., 592 F.Supp. 380 (E.D. La. 1984). In many instances it may be necessary to retain more than one attorney, such as in the case where

it is necessary to associate local counsel to facilitate an efficient administration of the litigation. See Id. at 396. IN certain situations it may also be necessary to have an additional attorney to assist at trial. However, when such hours are duplicative, the Court may not properly allow them to be recovered. See Daggett v. Kimmelman, 617 F.Supp. 1269 (D.C.N.J. 1985).

In this case, the hours which defendants claim are duplicative are primarily hours billed for trial time. The total number of hours spent on trial time and hearings by both Mr. Horton and Mr. Freeberg which are duplicative is 39.² In addition, the Court has also identified other hours which appear to be duplicative, namely those billed by both Mr. Horton and Mr. Freeberg for attendance at the depositions of William Leoni, Marianne Morton and Charles Lawson, totalling 19.5 hours.³

With regard to the duplicative hours spent

by both attorneys at trial and at depositions, the burden is upon the fee applicant to prove that such hours were reasonably necessary. United Slate, supra, 732 F.2d at 502, n.2. Plaintiffs have not articulated any reason why the 39 hours spent at trial and the 19.5 hours spent on depositions were necessary. Both Mr. Horton and Mr. Freeberg attended the trial and depositions, yet they have not justified the necessity for the presence of two attorneys from the same law firm. Furthermore, the Court notes that on other occasions where both attorneys were present, only one attorney's hours were billed. Certainly if two attorneys were necessary at trial and depositions, plaintiffs' counsel would have submitted billings for all occasions when they were both present.

Finally, the Court has identified an additional 6.25 hours it finds to be duplicative or redundant.⁴ Many of these

hours were spent in conferences between attorneys or with third persons, and both attorneys should not be compensated for hours spent in conference. Daggett, supra, 617 F.Supp. at 1281. Therefore, the Court will reduce plaintiffs' number of hours for 1983 by 64.75 hours to eliminate duplicative work performed during that period.

Hours that are excessive or unnecessary should also be excluded from a fee award by the district court. Hensley, supra, 461 U.S. at 434, 103 S.Ct. at 1939. In order for a court to determine the reasonableness of an attorney's hours, the billings must be sufficiently documented to enable the court to discern how the time was spent. If the documentation is inadequate, the district court should not allow recovery of the hours at their value. United Slate, 732 F.2d at 502. While plaintiffs' submitted billings are not totally inadequate, the Court has found numerous areas that are lacking any

specificity at all. For example, between May 8, 1984 and June 22, 1984, at least 7 hours of time was devoted to a "supplemental brief." Yet, there is no indication as to what issue the supplemental brief addressed, nor was there ever any indication that a supplemental brief was filed with the Court. Other examples of billings which illustrate a great measure of inadequate documentation include those made for telephone conferences. A typical billing for a telephone conference is "telephone conference...re status." The obvious question is, "status of what?" Another entry states "Telephone conference...re preparation of." Here again, preparation of what? Billings such as these would certainly not be submitted to fee-paying clients. The Court and opposing counsel charged with paying the bill should be given the same consideration as that given to fee-paying clients. Ecoc, Inc. v. Brinegar,

supra, 671 F. Supp. at 381.

Defendants have also objected to plaintiffs' hours because fifteen minutes was the least amount of time spent on any project, and any work which required more than fifteen minutes of time was billed in fifteen minute intervals.⁶ With regard to this objection, the Court notes that each telephone call, each office conference and each review of documents consumed no less than fifteen minutes of time. Regardless of the fact that certain items of short duration may not have been billed, billing practices such as this do not accurately reflect actual hours spent. See id. at 395-96. A more suitable method would have been to bill in tenths, thus resulting in more precise entries such as 2.6 hours or .7 hours.⁷

After reviewing plaintiffs' hours, the Court is convinced that some of these hours were excessive or unnecessary. This

conclusion is warranted by entries which are incomplete or inaccurate, by yours that are insubstantiated due to a lack of work product and by billing practices which are inadequate. Since these hours are not properly compensable, they must be excluded from the award of fees. The Court finds that a 10% reduction in the number of hours sought by plaintiffs should be adequate to compensate for excessive and unreasonable hours.

Hours incurred in unsuccessful and unrelated claims may also not be taken into consideration in a fee award. Hensley, 461 U.S. at 434-435, 103 S.Ct. at 1940. Where multiple claims are presented by the lawsuit, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Id. However, where time spent on a particular claim can be segregated from time spent on another unsuccessful claim,

the number of hours should be reduced accordingly. See Merkel v. Scovill, supra, 590 S. Supp. at 533.

The complaint in this case stated six different causes of action against six different defendants. The six counts in the complaint included Count I, breach of contract; Count II, breach of the builders' trust fund imposed under M.S.A. § 26.331; Mich. Comp. Laws Ann. § 570.151; Count III, conversion and misappropriation; Count VI, ERISA; Count V, alter ego/successor corporation theory of liability; and Count VI, injunctive relief. Count II was dismissed early on in the litigation when the Court granted defendants' motion for a directed verdict as to that claim. Upon completion of the trial, the Court found for plaintiffs on the breach of contract claim, on the ERISA claim and on the later ego/successor liability claim. Count III was dismissed as to all defendants, and the

complaint was dismissed in its entirety as to defendants WPM, Inc., C.J. Rogers-Cooper and William H. Leoni. Therefore, plaintiffs' failed to prevail on a great deal of their case.

Many of the claims are interrelated, such as the breach of contract claim and the ERISA claim. However, the majority of the claims which were dismissed were not related. The conversion and misappropriation claim was unrelated to the contract claim and the ERISA claim, as the proof required differed greatly. Furthermore, the claims against the dismissed defendants were totally unrelated to plaintiffs' successful claims. Defendants WPM, Inc. C.J. Rogers-Cooper and William Leoni were wholly different entities from the other defendants and additional evidence was necessary to prove that they were the alter egos of defendants Chas. J. Rogers Excavating, Inc., Charles J. Rogers

Construct Co., or C.J. Rogers, Inc.

Since the Court finds that Count III was unrelated to the plaintiffs' successful claims and that all other counts as to the dismissed defendants were unrelated to plaintiffs' successful claims, the number of hours must be reduced by some amount that reflects the amount of time spent on those claims. Although the cryptic nature of plaintiffs' proposed billings has made it difficult to discern which hours are related to the successful claims, the Court believes that a 20% reduction adequately reflects the amount of work done on the unsuccessful claims without reducing unfairly any hours spent on the successful claims. Therefore, plaintiffs' hours will be reduced by a total of 30% in addition to the 64.75 hours already enumerated which reflect duplicative billings.

2. Reasonable Hourly Rate

A reasonable attorneys' fee should be

calculated by using the hourly rates which are the prevailing market rates within the relevant community. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed. 2d 891 (1984); Northcross, supra, 611 F.2d at 638. The hourly rate awarded should reflect the training, background, skill and experience of each individual attorney, and should be reasonable under the circumstances of the case. Northcross, 611 F.2d at 638. The rates submitted by plaintiffs' attorneys are \$80 per hour for work performed through the end of 1983, \$100 per hour for work performed through the end of 1983, \$100 per hour for 1984 and \$125 per hour from the beginning of 1985 through the present date.

The Court finds that the hourly rates are reasonable and are supported by fee awards in other similar cases and by the prevailing market rates in the community. See e.g., Central States, Southeast, v. C.J. Rogers Transportation Co., 544 F.Supp. 308, 315

(E.D. Mich. 1982) (\$75 per hour awarded in ERISA action); Central States, Southeast v. Alco Express Co., 522 F.Supp. 919, 934 (E.D. Mich. 1982) (\$75 per hour awarded in ERISA action). See also 61 Mich. B.J. 119 (Feb. 1982); Wright, 1984 Economics of Law Practice Survey of Michigan Lawyers: Part II, 64 Mich. B.J. 1306, 1312 (December 1984). Although plaintiffs' attorneys' hourly rate rose more than 56% between December of 1983 and January of 1985, this increase is not unjustified, given the fact that his litigation has endured a long life, during which time market rates have increased rapidly. See Cooper v. Dyke, 814 F.2d 941 (4th Cir. 1987); Economics of Law Practice in Michigan, 67 Mich. B.J. (special supplement) at 21-23 (November 1988) (median hourly rate of \$92.00 has increased 23% since 1984, and 50% of Michigan labor lawyers now charge at least \$120 per hour). Finally, not only did defendants not object

to plaintiffs' attorneys' hourly rates, but they also seek an hourly rate of \$125 per hour in their request for attorney fees.

3. Calculation of a Reasonable Attorney Fee

Once a reasonable number of hours and a reasonable hourly rate have been determined, the two figures may be multiplied to produce the proper amount of the fee award. This case presents a particularly acute situation in that plaintiffs' hours, which have been billed at three different hourly rates, must be reduced by 30%. Since the hours to be deducted have not been specifically identified, an across the board reduction in the total number of hours may unfairly reduce hours which have been billed at the highest rate. Thus, in order to avoid an excessive reduction of hours billed at the higher rate, the Court will proportion the hours by hourly rate according to the weighted percentage of total hours billed at

the particular rate. The number of hours billed for each hourly rate is as follows: for 1983, a total of 316.25 hours (169 by Mr. Horton and 147.25 by Mr. Freeberg (212 hours less 64.75 duplicative hours)) were billed at \$80 per hour; for 1984, a total of 155 hours were billed at \$100 per hour; and for the period 1985-87, 107.25 hours were billed at \$125.00 per hour. Since the total number of hours billed equals 578.5, 173.6 hours (30%) will be deducted. Given these figures, the fee award will be calculated as set forth below:

<u>PERIOD</u>	<u>HOURS BILLED</u>	<u>PERCENTAGE OF TOTAL</u>	<u>REDUCTION</u>	<u>HOURLY RATE</u>	<u>AMOUNT OF FEE</u>
1983	316.25	54.7	95.0	\$ 80.00	\$17,700.00
1984	155.00	26.8	46.5	100.00	10,850.00
1985-87	<u>107.25</u>	<u>18.5</u>	<u>32.1</u>	<u>125.00</u>	<u>9,393.75</u>
TOTALS	578.50	100.0	173.6		<u>\$37,943.75</u>

Therefore, the total attorney's fees awarded to plaintiffs is \$37,943.75.

3. Plaintiffs' Costs

Plaintiffs have submitted a bill of costs incurred in this matter in memorandum form. Defendants have objected to several of plaintiffs' claimed expenses as being improper. As there has been no objection to the docket fee and the witness fees, these costs will be allowed.

The remainder of the costs and disbursements submitted by plaintiffs will be reviewed under 28 U.S.C. § 1920. Section 1920 enumerates those costs which the court may award.⁷ Northcross, supra, 611 F.2d at 642. An award of costs pursuant to this section lies within the sound discretion of the trial court. Id. The objections will be addressed in the order presented in plaintiffs' memorandum of costs.

Defendants' first objection is to the service fee of \$195.00.. The objection to the service fee is that it is unclear as to whom the fees was paid and why. If this expense is allowed under 28 U.S.C. § 1920 at

all, it must fall within subsection 1, which allows the Court to tax fees of the clerk and marshal. Although it may be unclear as to whom the fee was paid, it is obvious that the claimed service fee was made in connection with service of process. This being the case, the Court must deny this amount as 28 U.S.C. § 1920(1) does not authorize such an expense. Crues v. KFC Corp., 768 F.2d 230, 234 (8th Cir. 1985). See also Wright, Miller & Kane, Federal Practice & Procedure § 2677 at 371.72.

The next objection interposed by defendants is to the amount claimed for depositions and transcripts. Since there are separate objections to the transcripts and the depositions, the Court will address the issue of the transcripts first. Pursuant to 28 U.S.C. § 1920(2), fees of the court reported incurred in obtaining any part of the transcript may be taxed as costs, if the transcript was "necessarily

obtained for use in the case." Defendants' objection to the transcript cost is that the bulk of the transcript cost was from the Court's own court reporter and not from independent court reporters. This argument is without merit. The relevant inquiry is not from whom was the transcript obtained, but rather whether the transcript was necessary. Furthermore, the transcript does not have to be indispensable to the litigation, but must only be necessary to the Court's handling of the case. See 10 Wright, Miller & Kane, Federal Practice & Procedure § 2677 at 350-351. A transcript that is obtained merely for the convenience of counsel is not necessary. Hill v. BASF Wyandotte Corp., 547 F.Supp. 348 (W.D. Mich. 1982).

After reviewing the circumstances of this case, the Court is convinced that the transcripts were necessary. This finding is supported by the protracted trial of this

matter, which consumed almost one year's time. See National Bancard v. Visa U.S.A., Inc., 112 F.R.D. 62 (S.D. Fla. 1986); Kaiser Industries Corp. v. McLouth Steel Corp., 50 F.R.D. 5 (E.D. Mich. 1970). Furthermore, it is curious that defendants now object to these costs since defendants' counsel also obtained portions of the transcript from the court reporter and would surely also seek to tax the reporter's fees as costs if they were successful in this matter. Although plaintiffs have lumped together their expenses for transcripts and depositions into one figure of \$3,991.74, the Court has learned that the actual fees of the court reported paid by plaintiffs are \$2,005.00. Therefore, transcript fees in this amount will be awarded.

The remaining \$1,986.74 from the deposition/transcript figure represents the amount which plaintiffs seek to have taxed as costs. The cost of depositions may be

taxed in the Court's discretion, under 28 U.S.C. § 1920(2). Hollenbeck v. Falstaff Brewing Corp., 605 G.Supp. 421 (E.D. Mo. 1984); Hill, 547 F.Supp. at 351. Defendant objects to costs for deposition transcripts to the extent that such depositions were not admitted into evidence and actually used in the case. This argument is without merit since depositions which are not used at trial may still be taxed if, when taken, they appeared to be reasonably necessary for use in trial. See Hollenbeck, 605 F.Supp. at 439; Hill, 547 F.Supp. at 351; 10 Wright, Miller & Kane, Federal Practice & Procedure §2676 at 341. However, the state of plaintiffs' proposed deposition costs has made it virtually impossible to determine which depositions were reasonably necessary since these costs are not itemized. See Lyons v. Cunningham, 584 F.Supp. 1147 (S.D.N.Y. 1983). Plaintiffs are directed to file a list of itemized deposition costs

with the Court. Thereafter, upon receiving any additional objections on behalf of the defendant, the Court will tax those deposition costs which it finds to be reasonably necessary, through an order amending the judgment.

The next item in dispute is the travel expenses submitted by plaintiffs in the amount of \$2,512.31. With plaintiffs' counsel being only one hour away from the courthouse, it is puzzling how such a large amount of expenses could be incurred, even if counsel remained overnight in Grand Rapids during trial. The Court notes that in situations where there are likely to be large expenses, prior Court approval should be obtained. Northcross, 611 F.2d at 642. Even had plaintiffs sought approval for these expenses, it is unlikely that such approval would have been forthcoming, since travel expenses are taxable as costs only when supported by compelling circumstances,

Hollenbeck, 605 F.Supp. at 439; Todd Shipyards v. Turbine Service, Inc., 592 F. Supp. 380, 404 (E.D. La. 1984); United States v. Bexar County, 89 F.R.D. 391 (W.D. 1981). Accordingly, plaintiffs' travel expenses will be denied.

Finally, plaintiffs' have submitted amounts which they seek to have taxed as costs for film and developing (\$29.54), Michigan Annual Report (\$140.50), telephone call (\$1,256.02), photocopies (\$754.00), postage (\$244.09) and Federal Express (\$31.00). Expenses such as these, which are allowable as costs in some cases, are beyond the statutory scope of 28 U.S.C. § 1920. If a court deems it appropriate to tax such expenses as costs, it must rely on its inherent equity power. However, the Supreme Court has admonished the district courts to invoke their discretion sparingly in taxing costs. Farmer v. Arabian American Oil Company, 379 U.S. 227, 85 S.Ct. 441, 13

L.Ed. 2d 248 (1964). As one court has aptly stated, "[c]osts are not to be equated with expenses. They are...a term of art defined by 28 U.S.C. § 1920, rather than to be measured by the chancellor's foot." Abbott Laboratories v. Granite Insurance Co., 104 F.R.D. 42 (N.D.Ill. 1984). No exceptional circumstances exist in this case which would justify taxing these "out of pocket" expenses as costs. Thus, these expenses will be denied. See Hollenbeck, 605 F.Supp. at 439.

In summary, the following expenses will be taxed by the Court as costs:

Docket Fee	\$ 60.00
Witness Fees	\$ 245.00
Transcript Fees	<u>2,005.00</u>
Total	\$2,310.00

An additional amount for deposition costs may be awarded to plaintiffs after an itemized list of depositions is submitted to the Court for further review.

B. Defendants' Motion for Attorney Fees

The defendants have also moved the Court for an award of attorney fees pursuant to 29 U.S.C. § 1132(g)(1). Unlike the award to plaintiffs, an award to the defendants that were successful in defending against plaintiffs' claims is discretionary. In this case, the Court is instructed by the guidelines for attorney fees set forth by the Sixth Circuit in Central States Pension Fund v. 888 Corp., 813 F.2d 760 (6th Cir. 1987). The Court should consider:

(1) The degree of the opposing party's culpability or bad faith;

(2) The ability of the opposing party to satisfy an award of attorney's fees.

(3) Whether an award of fees against the opposing party would deter others from acting in similar circumstances;

(5) The relative merits of the parties' position.

Id. at 767.

With these factors in mind, the Court

finds no support for an award of attorney fees to defendants. There has certainly been no showing of bad faith by the plaintiffs in this case, nor any showing that this action was frivolous. On the contrary, the trustees of the trust funds had a fiduciary duty to the beneficiaries to bring this action to collect on delinquent contributions. Furthermore, there would likely be no deterrent effect in this case since failure to act on this matter would likely result in a breach of the trustees' fiduciary duty. Deterrence weighs much heavier in attorney fees awards against employers, since it will provide incentive to comply with ERISA. See Carpenters Southern California Admin. Corp. v. Russell, 726 F.2d 1410, 1416 (9th Cir. 1984). Finally, although plaintiffs failed to prevail on several of their claims turned on close factual questions. Central States, supra, 813 F.2d at 767.

IV. Payment Period

The parties have also disagreed on the period in which defendants should pay the judgment. Plaintiffs have asked that the judgment be paid within thirty days from entry of the judgment and defendants have requested that the judgment be paid in 24 equal installments, with the last payment including post judgment interest that has accrued up to that date. The Court finds that a twelve month payment period in which twelve equal payments are made is reasonable and should protect the interests of both parties. The last payment will include all post judgment interest that accrues after entry of the judgment.

V. Conclusion

The amount of the judgment to be paid to plaintiffs by defendants is \$100,904.68 plus prejudgment interest in the amount of \$96,643.56. Defendant shall also pay \$96,643.56 as double interest under 29

U.S.C. § 1132(g)(2)(C), attorney fees in the amount of \$37,943.75 and costs in the amount of \$2,310.00 plus post judgment interest to be calculated based upon the judgment interest rate in effect on the date the judgment is entered. No attorney fees will be awarded to defendant. Plaintiffs are instructed to file with the Court an itemized list of deposition costs, no later than twenty days from the date of this order.

IT IS SO ORDERED.

Wendell A. Miles, Senior Judge

Dated: December 23, 1988

Footnotes

1/ The total amount of interest on the judgment through December 1988 is \$103,520.82. Since the court has found certain amounts should be deducted for non-job site related yard work and for work performed under the Roadbuilders' Agreement, interest may not properly be charged for these amounts. Accordingly, a total of \$2,877.26 has been deducted to reflect the

amount of interest on the work performed under the Roadbuilders' Agreement. Of this amount, \$2,178.35 has been deducted for work performed for "Excavating" and \$698.91 has been deducted for work performed for "Construction."

2/ In Hensley, the Supreme Court enunciated standards governing awards of attorney fees pursuant to the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. But the Court also noted that the standards which it set forth "are generally applicable in all cases in which Congress has authorized an award of fees." Id. 461 U.S. at 434 n. 7, 103 S.Ct. at 1939 n. 7. See also United Slate, supra, 732 F.2d at 502; Merkel v. Scovill, Inc., 590 F.Supp. 529, 532 (S.D. Ohio 1984); Davidson v. Cook, 594 F.Supp. 418, 421 (E.D. Va. 1984).

3/ On July 1, 1983, Mr. Freeberg and Mr. Horton both attended an injunction hearing in Grand Rapids, which represents four of the 39 hours. The additional 35 hours were billed for trial time in Grand Rapids on September 26-29 when both attorneys were present. During this time, as usual, only Mr. Horton conducted the examination of witnesses. While this was not the only time that both attorneys were in attendance for trial, it is the only time that a bill was submitted for time spent by both attorneys. Because the court finds that it was unnecessary for two attorneys to be present at the trial, recovery for these hours will be denied.

4/ Both Mr. Freeberg and Mr. Horton were present for the depositions of William Leoni and Marianne Morton on August 29, 1983. Mr Horton's hours reflect that 10 hours were spent deposing Mr. Leoni and Ms. Morton on

that date. Mr. Freeberg's hours indicate that on August 28, 1983, he spent 2-1/2 hours in the deposition of Mr. Leoni, and that on August 29, 1983 he spent 7 hours on the depositions of Mr. Leoni and the payroll auditor (Ms. Morton). It is interesting to note that the notice of taking the depositions indicates that depositions were scheduled only for August 29. No notice ever indicated that a deposition would be taken on August 28. Thus, Mr. Freeberg's and Mr. Horton's records reflect not only duplicative billings, but also a lack of accurate billing practices.

Assuming that Mr. Freeberg actually spent the 7 hours and the 2-1/2 hours at the depositions of Mr. Leoni and Ms. Morton on August 29, there would be a total of 19-1/2 hours billed by two attorneys representing the same client at the same depositions. As plaintiffs have advanced no reason why two attorneys should be present at the same deposition, Mr. Freeberg's 9 1/2 hours will not be allowed since the defendant should not have to foot the bill for the luxury of two attorneys performing the work of one.

There was also no necessity for two attorneys at the depositions of Mr. Leoni, Ms. Morton and Mr. Lawson on September 19, 1983. Mr. Freeberg billed 10 hours and Mr. Horton billed 10 hours, a total of 20 hours for two attorneys at one deposition. Furthermore, Mr. Horton was the only attorney who examined the witnesses, and it is thus doubtful if there was any actual necessity for a second attorney to be present. Therefore, only 10 hours of billable time will be allowed for September 19.

5/ Many of these redundant or duplicative

hours were spent in conferences. On May 10, 1983, Mr. Horton billed 5 hours and Mr. Freeberg billed 3 hours for a conference with Mike Gauthier in Lansing. On July 13, 1983, Mr. Horton and Mr. Freeberg each billed 1.5 hours for an office conference between them concerning this litigation. On August 12, 1983, both attorneys billed 1/2 hour for a telephone conference concerning a deposition. Furthermore, on November 21, 1983 both attorneys billed 1-1/4 hours for an office conference about trial preparation. The Court is hesitant to allow recovery for these hours. In some cases, it may be proper to bill for every attorney who participates in an inter-office conference. However, if a client is billed for the time of several attorneys in an office conference, the hourly rate should be reduced so that the client does not pay double the usual billing rate. In this case, the Court believes that only one attorney's hours should be allowed since it appears that the usual practice was to bill for only one attorney (see Mr. Horton's billings for June 22, June 27, July 7, July 13 and September 8, 1983 and compare with Mr. Freeberg's). Therefore, 6.25 hours will be excluded from the total amount submitted.

6/ Defendants argue that the hours submitted by plaintiffs are unreasonable in view of the twelve factors enunciated in Hensley v. Eckerhart, 461 U.S. 424, 103 Ct. 1933, 76 L.Ed.2d 40 (1983) and Davidson v. Cook, 594 F.Supp. 418 (E.D. Va. 1984). The twelve factors which defendants refer to were set forth by the Fifth Circuit in Johnson v. Georgia Highway Express, 448 F.2d 714 (5th Cir. 1974). While these factors are helpful in establishing an award of attorney fees, the Sixth Circuit does not require district courts to expressly

consider them. On the contrary, the Court need only consider the hours of service provided and a reasonable rate of compensation. Murphy v. Inter. Union of Operating Engineers, 774 F.2d 114 (6th Cir. 1985).

7/ While .1 or .2 hours may seem like a small amount with regard to each individual entry, a billing practice that uses tenths of hours rather than quarter hours may result in a substantial difference when there are five years of billings.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN CARPENTERS COUNCIL HEALTH AND
WELFARE FUND,

et al.,

Plaintiffs,

No. G83-582 CA5

v.

CHARLES J. ROGERS CONSTRUCTION
CO., et al.,

Defendant.

JUDGMENT

The Court, having received and considered proposed judgments on behalf of plaintiffs and defendants as ordered by the Court on July 16, 1987, and pursuant to the Court's

opinion entered in this matter on December 23, 1988;

IT IS HEREBY ORDERED that judgment be entered in this matter pursuant to 29 U.S.C. §1132(g), as follows:

1. Judgment is hereby entered in favor of plaintiffs and against defendants, Charles J. Rogers Construction, et al., for unpaid contributions in the amount of \$100,904.68, together with interest at the rate prescribed under 26 U.S.C. §6621 on the unpaid contributions in the amount of \$96,643.56, plus an amount equal to the interest on the unpaid contributions in the amount of \$96,643.56, together with reasonable attorney fees of \$37,943.75, and costs in the amount of \$2,310.00, for a total of \$334,445.55, plus judgment interest to be calculated based upon the judgment interest rate in effect as of the date of entry of judgment.

2. The judgment shall be paid in twelve

equal installments of \$27,870.46, with the last payment to include all post judgment interest that accrues from the date of this judgment until the final payment.

3. When defendants pay the judgment in full, then plaintiffs shall file with this Court a satisfaction of judgment granting a full release to defendants of all claims arising out of or relating to the subject matter of this litigation.

4. This case is dismissed in its entirety with prejudice on all counts of the complaint as to defendants Rogers/Cooper, W.P.M., Inc., and William H. Leoni individually, and it is dismissed with prejudice on Counts II and III as to defendants Charles J. Rogers Construction Company, C.J. Rogers, Inc., and Chas. J. Rogers Excavating, Inc.

Wendell A. Miles, Senior

Judge

Dated: December 27, 1988

CHARLES J. ROGERS CONSTRUCTION COMPANYContributions Due

\$ 9,897.00
 \$ 1,232.14
 \$ 5,761.60
 1979
 \$ 14,782.91
 \$ 5,194.72
 \$ 15,231.33
 \$ 1,950.41
 \$ 1,027.04
 \$ 1,166.40
\$ 2,470.45
 \$ 58,714.00

Type of Work

Laborers' AUC Work 6/77 through 1980
 Laborers' AGC Work in Ann Arbor 1977
 Laborers' AGC Work in Ann Arbor 10/24/78 to
 1979
 Laborers' AGC Work in Saginaw 6/77 to 1979
 Laborers' AUC Work in Detroit 1977 & 1978
 Laborers' AGC Work in Detroit 6/77 to 5/78
 Laborers' AGC Work in Detroit 6/1/78 to 1979
 Carpenters' Roadbuilders Work 1978 to 1979
 Carpenters' AGC Work South Central Area
 Carpenters' AGC Work in Saginaw Valley Area

CHAS. J. ROGERS EXCAVATING, INC.

\$ 3,384.47
 \$ 3,495.12
 \$ 2,297.13
 \$ 66.28
\$ 2,494.11
 \$ 11,737.11

Laborers' AUC Work Outstate 1978 & 1979
 Laborers' Roadbuilders Work 1978 & 1979
 Laborers' AGC Work in Monroe 1978
 Laborers' AGC Work in Ann Arbor 1978
 Laborers' AUC Work in Detroit 1978 & 1979

C.J. ROGERS, INC.

\$ 3,369.08
 1983
 \$ 13.52
 through 8/1/82
 \$ 674.93
 \$ 7,099.70
 \$ 14,947.85
 1983
 \$ 5,349.12
 \$ 21.29
 \$ 12,800.86
 \$ 166.59
 \$ 2,258.55
\$ 1,863.42
 \$ 48,564.91

Laborers' AUC Work Outstate 8/23/82 through
 1983
 Laborers' AGC Work in Ann Arbor 1/1/82
 Laborers' AGC Work in Ann Arbor 1983
 Laborers' Roadbuilders Work in 1982 & 1983
 Laborers' AGC Work in Flint 2/6/81 through
 1983
 Laborers' AGC Work Outstate prior to 8/23/82
 Laborers' AGC Work in Monroe 1981
 Laborers' AUC Work in Detroit 8/23/82 to 1983
 Laborers' AGC Work in Detroit October 1981
 Laborers' AGC Work in Detroit after 5/1/82
 Carpenters' Work

\$ 119,016.02

Total Due for All Companies

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CARPENTERS COUNCIL
HEALTH AND WELFARE FUND, et al.,

Plaintiffs, Case No. G83-582 CA5

-vs-

OPINION AND ORDER RE
MOTION TO ALTER OR AMEND
JUDGMENT

CHARLES J. ROGERS CONSTRUCTION
CO., et al.,

Defendants.

Defendants Charles J. Rogers Construction Company, et al., have filed a motion pursuant to Fed. R. Civ. P. 59(e), in which they seek to have the Court alter or amend the judgment entered in this case on December 27, 1988.¹ Plaintiff trust funds filed this action to collect delinquent

¹ Defendants have also made a motion for reconsideration, which is, in reality, a motion to alter or amend. United States v. Gargano, 826 F.2d 610 (7th Cir. 1987). Thus, for purposes of this opinion, defendants' motions will be treated as a single motion to alter or amend.

contributions owed by defendants to the trust funds, pursuant to section 302 of the Labor Management Relations Act, 29 U.S.C. §186 and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, et seq. The crux of defendants' motion is that the Court has erred in applying the alter-ego doctrine to the facts of this case, and by doing so, has undermined the public policy behind the state reorganization laws since the disposition of this case will allow a creditor to refuse to participate in a reorganization plan, file a suit in federal court, and receive a preference over other creditors. As the Court understands defendants' motion, two grounds of error are stated which arrant alteration, amendment or vacation of the judgment. The first ground is, as stated previously, that the Court has misapplied the alter-ego doctrine; the second ground, set forth impliedly in defendants' motion, is that the Court should

have abstained from exercising jurisdiction in this matter due to the pending state court reorganization.

Plaintiffs' response to defendants' motion is simply that the motion is not timely in regard to the findings entered by the Court on November 20, 1985. However, this argument only demonstrates plaintiffs' misperception of Rule 59(e). Rule 59(e) clearly states that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Thus, for purposes of the ten-day limit set forth for Rule 59 motions, the proper focal point is the date on which judgment was entered, rather than the date on which findings of fact and conclusions of law were entered. Wilson v. United States, 669 F. Supp. 563 (E.D. N.Y. 1987). Since the rule 59(e) period does not commence until the filing of a judgment, the date on which findings of fact and conclusions of law were

issued is irrelevant. Id. at 565.

The judgment in this matter was entered on December 27, 1988. Thus, under the Fed. R. Civ. P. 6(a) computation, the last day on which defendants could serve this motion in a timely manner would be January 11, 1989. Since a copy of defendants' motion was mailed to plaintiffs on January 11, the Court finds that it was timely. Fed. R. Civ. P. 5(b); Emory v. Secretary of Navy, 819 F.2d 291, 293 n.5 (D.C. Cir. 1987).

A. THE ALTER-EGO DOCTRINE

Defendants contend in their motion that the Court misapplied the alter-ego doctrine in holding that C.J. Rogers, Inc. (Inc.) (formed in the state reorganization) is the alter-ego of both Charles J. Rogers Excavating (Excavating) and Charles J. Rogers Construction (Construction). In support of this argument, defendants have cited selected portions of the findings of fact and conclusions of law rendered by this

Court. Specifically, defendants point out that the Court found that alter-ego findings generally "rest upon a finding of anti-union animus or an attempt to surreptitiously evade contractual obligations," but then went on to find that the creation of Inc. was devoid of anti-union animus and that the formation of Inc. was done for legitimate business purposes, without any fraud or misdealing with any of the creditors. Therefore, defendants argue, since there was not anti-union animus, fraud or misdealing in the creation of Inc., and since the Genessee County Circuit court approved the reorganization after full disclosure to all creditors, including plaintiffs, the Court improperly found that Inc. is the alter-ego of Excavating and Construction.

After reviewing the findings of fact and conclusions of law previously issued and the relevant case law, the Court rejects the contention that the alter-ego doctrine has

been misapplied to the facts of this case. The Court first notes that defendants' selected portions of the findings of fact and conclusions of law do not adequately expose the basis for the Court's conclusions. For example, defendants fail to note that, at page 41 of the findings of fact and conclusion of law, the Court found that "Inc. simply picked up where Construction and Excavating left off, utilizing the same personal, equipment, supervision, serving the same customers and performing the same contracts as Construction and Excavating had been doing before May 1980."

In analyzing an alter-ego claim, a court may consider identity of management, business purpose, operation, equipment, customers, supervision and ownership between the old entity and its successor. Fugazy Continental Corp. v. N.L.R.B., 725 F.2d 1416, 1419 (D.C. Cir. 1974). The Court's

conclusion that Inc. was the alter-ego of both Excavating and Construction was premised upon findings that substantially all of the factors set forth, supra, were evident in this case, and that Inc. was merely a continuation of Construction and Excavating.

It is true that the presence of anti-union animus or unfair labor practices oftentimes provides the bulwark around which an alter-ego situation may be found to exist. N.L.R.B. v. Tricor Products, Inc., 636 F.2d 266 (10th Cir. 1980). Furthermore, just as the presence of anti-union animus runs in favor of an alter-ego finding, the absence of such animus makes it less likely that alter-ego status will be found. Id. at 270. However, as the Court stated in the findings of fact and conclusions of law, "it is now doubtful whether anti-union animus is a sine qua non of alter-ego status." Findings of Fact and conclusions of Law at 42. In other

words, anti-union animus is not such that it is a crucial linchpin, without which an alter-ego entity could not exist. Thus, while the absence of any anti-union sentiment is a strong factor to be considered, it is by no means ipso fact determinative of a finding that no alter-ego status existed. Greater Kansas City Laborers Pension Fund v. Thummel, 738 F.2d 926, 930 (8th Cir. 1984).

B. ABSTENTION

Defendants' second argument is that by finding Inc. to be the alter-ego of Construction and Excavating, the Court has completely circumvented the reorganization plan worked out by the majority of creditors in the circuit court. In addition, defendants also point out that the Court has given one creditor a preference over all other creditors to which it is not entitled, since it chose not to participate in the reorganization plan. The Court thus

understands this argument to be that this Court should not have exercised jurisdiction in this matter since it has undermined the state court reorganization plan, in contravention of the strong public policy of the reorganization laws which enable a company to continue business and preserve laborers' jobs.

There exists a strong federal policy against federal court interference with pending state court proceedings. Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971). The reasons behind this policy rest upon notions of comity and respect for state functions, which are better performed when they are free from federal court interference. Id. at 44, 91 S. Ct. at 750. The Younger abstention doctrine requires federal courts to refrain from interfering in state criminal proceedings, except in extraordinary circumstances where federal defenses cannot be raised in state court

proceedings. The Supreme Court has also extended the Younger abstention doctrine to civil proceedings. Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 102 S. Ct. 2555 (1982). In Middlesex, the Court set forth a three part test to determine if abstention is appropriate in civil cases. Under the Middlesex test, abstention is appropriate if: (1) the state proceedings are judicial proceedings, (2) the proceedings implicate important state interests, and (3) there is an adequate opportunity to raise federal questions in the state proceedings. Id. at 423, 102 S. Ct. at 2521-22.

In this case, it is clear that the proceedings in the Genessee County Circuit Court were judicial proceedings. In addition, the state's interests in restoring businesses to solvency and in preserving laborers' jobs are, no doubt, important state interests. However, the court finds

that abstention was clearly inappropriate in this case based upon the third part of the Middlesex test, since the plaintiff trust funds could not have had their claims adjudicated in the state court proceeding.

This Court is guided by the principle that "once a court has jurisdiction over a particular res, no other court can proceed in rem with respect to the same res." Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980). This principle has particular application when two courts have concurrent jurisdiction over a particular res. Thus, in ERISA cases where jurisdiction was concurrent between state and federal courts, abstention has been found to be appropriate when a state court case involving the same or similar issues was pending. See Marcal Paper Mills, Inc. v. Ewing, 790 F.2d 195 (1st Cir. 1986); Levy v. Lewis, supra. However, this case does not involve a situation in which concurrent jurisdiction exists. Under

ERISA, an action by a fiduciary to recovery delinquent contributions is within the exclusive jurisdiction of the federal courts. Livolsi v. Ram Construction Co., Inc., 728 F.2d 600, 603 (3rd Cir. 1984).

When "exclusive" jurisdiction is reserved to federal courts, abstention is, without exception, inappropriate. Levy v. Lewis, supra, 635 F.2d at 960; Northwest Airlines, Inc. v. Gomez-Bethke, 34 Fair Empl. Prac. Cas. (BNA) 837 (D. Minn. 1984); Green v. Indal, Inc., 565 F. Supp. 805 (S.D. Ill. 1983). The case of Levy v. Lewis, supra, illustrates the concurrent jurisdiction-exclusive jurisdiction dichotomy. In that case, Lewis, the New York Superintendent of Insurance, was appointed to liquidate the Consolidated Mutual Insurance Company (CMIC). As a part of his statutory duties to consolidate and preserve CMIC's assets, Lewis terminated retirement benefits provided to the plaintiffs, who were

employees of CMIC. Lewis then instituted special proceedings in the New York Supreme Court to have the disallowance of the benefits approved. Subsequently, the employees filed an action pursuant to ERISA in the southern District of New York claiming that Lewis' actions (1) violated the terms of the plan in contravention of ERISA, and (2) constituted a breach of fiduciary duty in violation of ERISA.

The Second Circuit Court of Appeals held that it was appropriate for the district court to abstain from adjudicating the plaintiffs' first claim, which involved concurrent jurisdiction. The court reasoned that abstention was appropriate because of the need for unified proceedings for disposing of the assets of a single fund. Furthermore, the court held that abstention was appropriate in view of the state's interest in regulating its insurance companies. Id. at 966. However, as to the

plaintiffs' second claim, the court found that abstention was inappropriate since jurisdiction in breach of fiduciary duty claims under ERISA is reserved exclusively for the federal courts. Id. at 967. Hence, "federal courts must hear claims within their exclusive jurisdiction, for otherwise the right alleged would never be fully adjudicated." Id.

In this case, even had plaintiffs participated in the state court reorganization, they would be left with an inadequate remedy under ERISA, since the state court was without jurisdiction to decide their claims for delinquent contributions. Accordingly, defendants' argument in support of abstention is rejected.

CONCLUSION

In summary, the Court affirms its earlier conclusion that Inc. was the alter-ego of Construction and Excavating. Furthermore,

the Court finds that abstention was inappropriate in this case since jurisdiction over this action is vested exclusively in the federal courts. Accordingly, defendants' motion is DENIED.

IT IS SO ORDERED.

WENDELL A. MILES
Senior Judge

Dated: February 20, 1989

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CARPENTERS COUNCIL
HEALTH AND WELFARE FUND, et al.,

Plaintiffs, Case No. G83-582 CA5

-vs-

CHARLES J. ROGERS CONSTRUCTION
CO., et al.,

Defendants.

ORDER

Before the Court is plaintiffs' list of itemized deposition costs, submitted pursuant to the Court's order of December 23, 1988. The list sets forth seven different depositions, the date on which each was taken, and the cost for each individual deposition. The total amount claimed by plaintiffs is \$1,768.84, which has not been contested by defendants. In view of the fact that these depositions were introduced at trial, the Court finds that

they were reasonably necessary for the presentation of this case.

IT IS THEREFORE ORDERED that the judgment of the Court dated December 23, 1988, be amended to provide for additional costs to plaintiffs for depositions in the amount of \$1,768.84.

IT IS SO ORDERED.

WENDELL A. MILES
Senior Judge

Dated: February 20, 1989

STATEMENT AS TO CORPORATE PARENT
OR SUBSIDIARY RELATIONSHIPS

At the present time the corporate defendants in this proceeding are separate corporations and have no parent or subsidiary relationships. The Findings of Fact and Conclusions of Laws of the District Court, reproduced in the Appendix, pp 69a-87a, presents the pertinent historical information regarding the defendant corporations.

Supreme Court, U.S.
FILED

NOV 13 1991

OFFICE OF THE CLERK

Case No. 91 533

IN THE
SUPREME COURT OF THE

UNITED STATES

October 1991 Term

CHARLES J. ROGERS CONSTRUCTION,

a Michigan Corporation,

Petitioner,

v

TRUSTEES FOR MICHIGAN CARPENTERS

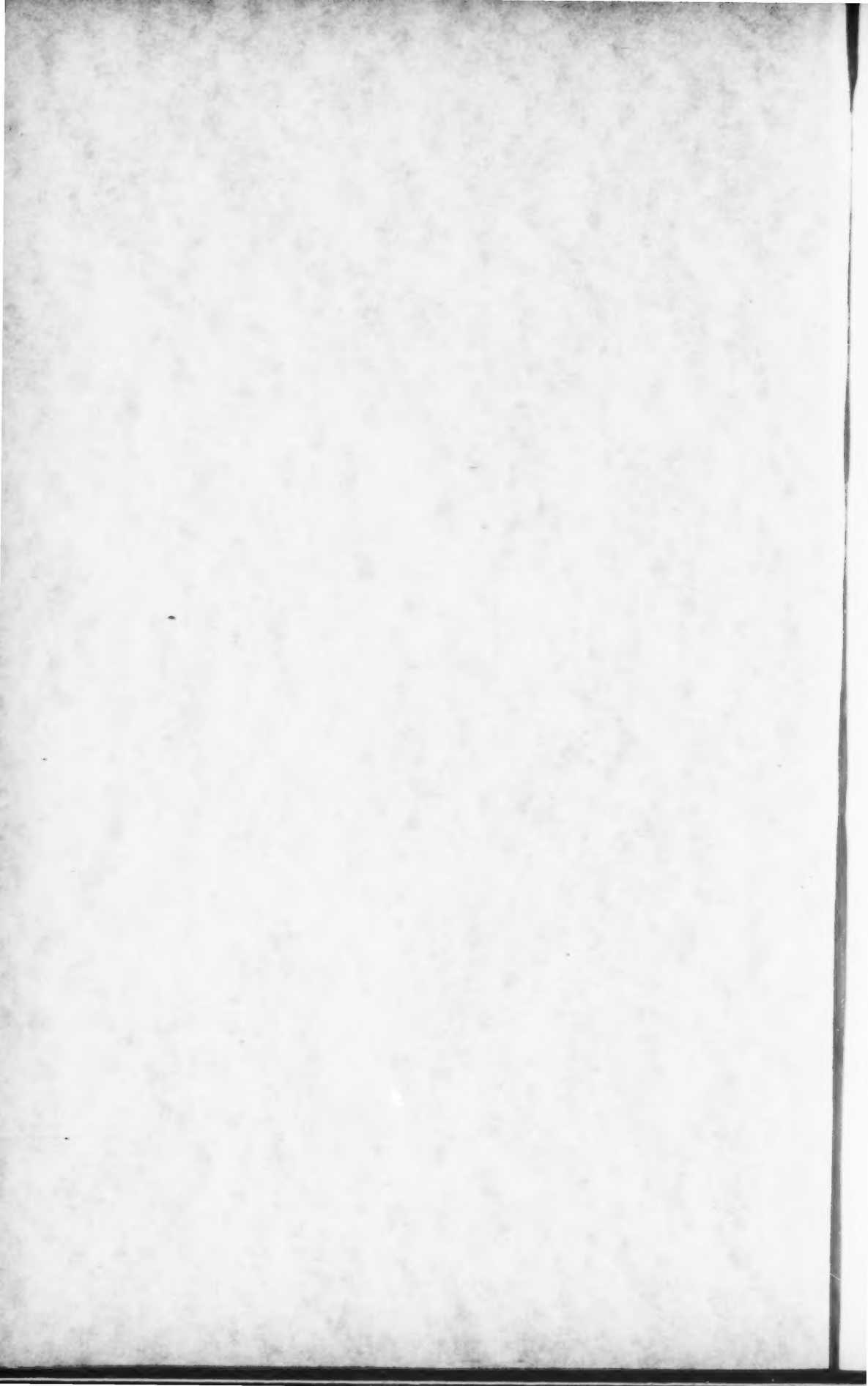
COUNCIL HEALTH AND WELFARE FUND,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF A
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

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THE SUPPLEMENTAL QUESTION
PRESENTED ON REVIEW

WHETHER THERE IS A CONFLICT IN THE
DECISIONS OF THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT CONCERNING
THE FEDERAL RULES OF APPELLATE
PROCEDURE AND JURISDICTION OF THE
PARTIES?

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918 F.2d 555 (CA 5 1990).7

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PRIOR OPINIONS IN THIS CASE

The United States Court of Appeals for the Sixth Circuit decided this case on May 10, 1991 and its opinion is reported in 933 F.2d 376 and was reproduced in the Appendix (1a-62a) to the Petition for a Writ of Certiorari, together with several opinions and orders of the United States District Court for the Western District of Michigan. Since the Court of Appeals decision in this case, the Sixth Circuit Court of Appeals has decided a case, International Union, UAW v United Screw & Bolt Corp., 941 F. 2d 466 (1991), which we believe is contrary to the decision in the case at bar as it relates to what parties were brought before the Court of Appeals by the Notices of Appeal filed in the Court of Appeals by the opposing parties in interest. Had the rule of this

subsequent decision been applied to the case at bar, the result, we believe, would have been a decision with applicability to all interested parties, rather than the two parties specifically mentioned in the captions of both Notices of Appeal. The pertinent portion of this subsequent decision is reproduced in the Appendix to this Supplemental Brief (5b-17b).

CONCISE STATEMENT OF THE CASE

The statement of the case will be limited to the facts and proceedings concerned with the ruling of the Sixth Circuit Court of Appeals as it dealt with its jurisdiction over the parties that contested the matters in the district court.

There were sixteen parties plaintiff and six parties defendant in

the action before the district court.
The caption of the Notice of Appeal
filed by the parties defendant
identified the parties as follows:

MICHIGAN CARPENTERS COUNCIL

HEALTH AND WELFARE FUND, et al.

Plaintiffs,

v

CHARLES J. ROGERS CONSTRUCTION

COMPANY, et al.,

Defendants.

Except for the initial pleadings, this
was the caption used by the parties and
the district court for all pleadings and
court orders, opinions and judgments.

The body of the Notice of Appeal
filed by the parties defendant stated:

Notice is hereby given that
Defendants, Charles J. Rogers
Construction Company, et. al., in
the above case no. G83-582 CA5,
hereby appeal to the United States

Court of Appeals for the Sixth Circuit from the Opinion and Order RE Motion to Alter and Amend the Judgment filed in this action on February 22, 1989, and the Judgment entered on December 27, 1988.

The Notice of Cross Appeal filed by the parties plaintiff was essentially identical to the Notice of Appeal filed by the parties defendant.

The parties defendant, past the time for filing a Notice of Appeal, moved to amend the caption of the Notice of Appeal. The parties plaintiff also similarly moved to amend the caption of its Notice of Cross Appeal. The Sixth Circuit Court of Appeals denied both of these motions (1 b- 2 b). Motions for reconsideration of this order were made by both contesting interests and these motions were granted and the question of the proper parties to the appeal was

referred to the panel assigned to determine the case on the merits (3b-5b).

The assigned panel ruled that the specificity requirements of Rule 3 (c) and 4 (a) (3) were not met and the only parties to the appeal were Charles J. Rogers Construction Co. and Michigan Carpenters Council Health & Welfare Fund (16a-17a).

Subsequent to filing the Petition for a Writ of Certiorari, counsel for Petitioner discovered a subsequent ruling of the Sixth Circuit Court of Appeals concerning the jurisdiction of courts of appeal as related to the contents of the Notice of Appeal and the Federal Rules of Appellate Procedure (5b-17b). We believe this ruling is contrary to the jurisdictional ruling made by the Sixth Circuit Court of Appeals in this case and seek to make the issue of that difference a part of the review of this Court.

ARGUMENT

DIFFERING DETERMINATIONS OF THE
SIXTH CIRCUIT COURT OF APPEALS
CONCERNING THE CONTENT OF NOTI-
CES OF APPEAL AND JURISDICTION
OF THAT COURT RAISE AN ISSUE AS
TO WHETHER PETITIONER HAS RE-
CEIVED THE EQUAL PROTECTION OF
THE LAW.

The determination of the panel of
the Sixth Circuit Court of Appeals, in
the case at bar, determined that the
Notice of Appeal and the Notice of
Cross-Appeal, because there was only one
appealing party specifically identified
in each document, lacked the specificity
required by Rules 3 (c) and 4 (a) (3)
so that the only parties to the appeal
were the single parties identified as
appellant parties in the Notice of
Appeal and the Notice of Cross Appeal
(14a-18a).

In International Union, UAW v United Screw & Bolt, supra, (13b-14b), it was determined that the Sixth Circuit Court of Appeals, pursuant to the Federal Rules of Appellate Procedure, had jurisdiction of all appellee parties, without regard to whether they were specifically identified in the Notice of Appeal. Cf. Streetman v Jordan, 918 F.2d 555 (CA 5 1990); Longmire v Guste, 921 F.2d 620 (CA 5 1991). A significant factor in this determination was that all of the litigants had notice of the full extent of the parties and issues on appeal:

Notwithstanding United Screw's failure to specifically mention the Local 217 in its Notice of Appeal, both parties were put on notice that the entire judgment that determined their legal rights with respect to each other was being called into question (16b).

There is no question that applying the foregoing reasoning of the panel in International Union, UAW v United Screw & Bolt, supra, to this case would have brought all of the parties and all of the issues of this case before the Sixth Circuit Court of Appeals. All of the parties were appellees to the appeal or cross appeal, and, as it was, the panel in this case determined that all of the issues, save one, were before the court.

, . . we further find that all issues on appeal are preserved with the exception of the claim that the district court erred in finding that Inc. was the alter ego of Construction and Excavating since Inc. failed to perfect its right to appeal. (17a),

and it would seem that if one facet of an "alter ego" is before the court, the

facet created by state reorganization proceedings to protect creditors should be before the court.

In terms of notice, it is evident that, here, there was no confusion in the parties. They knew that all of the issues of the judgments and orders appealed from were intended to be subject to the rulings of the court of appeals on review. It is only when this time honored criterion to jurisdiction is given no consideration that the parties and issues to this proceeding and the significance of extended trial proceedings became materially reduced; which reduction did not reduce one iota the burden of the court of appeals; rather it added to the burden.

The approach taken by the panel of the Sixth Circuit Court of Appeals in International Union, UAW v United Screw & Bolt Co., supra, has been used by

other courts of appeal in determining its jurisdiction. The Third Circuit, in In re Paoli R. R. Yard PCB Litigation, 916 F.2d 829, 838 (1990) considered notice the basis of jurisdiction, saying:

Indeed, correspondence from defense counsel confirms that no party was misled by the notice, and that all parties presumed it to include all plaintiffs referenced under the relevant docket numbers.

The Ninth Circuit, in Lockman Foundation v Evangelical Alliance Mission, 930 F2d 764, 772 (1991) considered notice the basis of jurisdiction, saying:

Where the appellee has argued the merits fully in its brief, it has not been prejudiced by the appellants failure to designate

specifically an order which is
subject to appeal.

Similarly, in the Eleventh Circuit,
Davis v Locke, 936 F.2d 1208, 1212,
(1991) notice has been the basis for
appellate jurisdiction:

Davis has presented no evidence
that he might be prejudiced by
our acceptance of this appeal, .
. . .

Of the same import is Cook v
International Transportation Corp., 940
F2d 207, 211 (CA 7 1991) where it held
that a defect in the Notice of Appeal
could be overlooked if it:

. . . did not mislead or
prejudice the appellee.

Other circuits have held that
designating the appellant parties in the
plural is sufficient. The Second

Circuit, in Association of American Medical Colleges v Cuomo, 913 F2d 55 (1990), held:

Notice of appeal indicating that 'the defendants in the above matter, hereby appeal' is the functional equivalent of naming each and every defendant and satisfied specificity requirements of Federal Appellate Rule 3 (c). (Headnote 1).

Cf. Cammack v Waihee, 932 F.2d 765 (CA 9 1991) and Galbraith v Cutter Biological, Inc., 931 F.2d 991 (CA 9, 1991).

When different panels of the same circuit, within several months, used conflicting bases for consideration of jurisdiction and these differing bases find support in decisions in other circuits, there are evident problems of equal application, and thus, equal

protection, of the law. While there have been denials of certiorari to those seeking review of the type of application of the Federal Rules of Appellate Procedure made in the case at bar, when contrary determinations appear in the same circuit and are supported by a significant number of decisions in other circuits, there is a need for resolution. Without resolution, of necessity, there are those who are not receiving the protection of the law that is the equal of the protection others receive. In the Sixth Circuit, equal protection of the law can be considered a happenstance of panel assignment. What protection the law affords should never be determined by the happenstance of presiding judges.

RELIEF

WHEREFORE, Petitioner prays that a Writ of Certiorari directed to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Carpenters Council
Health and Welfare Fund,
et al.
Plaintiffs,

Trustees for Michigan Carpen-
ters Council Health and Wel-
fare Fund,
Plaintiff-Appellant
(89-1412)

v.

O R D E R

Charles J. Rogers Construc-
tion, A Michigan Corporation,
Defendant-Appellant Filed
(89-1411)

Jun 14 1989

C. J. Rogers, Inc., a Michigan
Corporation, et al.
Defendants.

Before: KENNEDY, JONES and WELLFORD,
Circuit Judges. „

The defendant appeals (89-1411) and
the plaintiff cross-appeals (89-1412)
from the final judgment in favor of the
plaintiffs. Both defendants and
plaintiffs have filed motions to amend
the captions in their respective
appeals.

Rule 3(c), Fed. R. App. P.,

requires the notice of appeal to specify the party or parties taking the appeal. The use of "et al." in such a designation fails to provide such notice. Torres v Oakland Scavenger Company, 108 S.Ct. 2405 (1988); Ford v. Nicks, 866 F2d 865, 869, (6th Cir. 1989); Van Hoose v. Eidson, 450 F2d 746, 747 (6th Cir. 1971). This requirement is jurisdictional in nature and may not be waived. Torres, 108 S.Ct. at 2409. Further, we have no authority to amend a notice of appeal to add additional parties after the time for taking the appeal has expired. Rule 26(b), Fed. R. App. P.; See also Trinidad Corp. v Maru), 781 F2d 1360 (9th Cir. 1986) (per curiam); Cook and Sons Equipment, Inc. v Killen, 277 F2d 607 (9th Cir. 1960).

It therefore is ORDERED that the defendants' and plaintiffs' motions to amend the caption are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Carpenters Council
Health and Welfare Fund,
et al.

Plaintiffs

Trustees for Michigan Carpen-
ters Council Health and Wel-
fare Fund,

FILED
Sep 27 1989

Plaintiff-Appellant
(89-1412)

v.

O R D E R

Charles J. Rogers Construc-
tion, a Michigan Corporation,

Defendant-Appellant

C.J. Rogers, Inc., a Michigan
Corporation, et al.

Defendants.

Before: KENNEDY, JONES and WELLFORD,
Circuit Judges.

The defendant appeals (89-1411) and
the plaintiff cross-appeals (89-1412)
from the final judgment in favor of the
plaintiffs. We previously denied
motions to amend the captions filed by
both the defendant and the plaintiff.
Both now move for reconsideration of

of that order. The motions to reconsider raise issues of the proper parties to the appeal under Torres v. Oakland Scavenger Company, 108 S.Ct. 2405 (1988) and other cases. On the defendant's motion, briefing was ordered to be held in abeyance pending a ruling on the motion to reconsider.

We note that this Court has ordered an en banc review in another appeal, Minority Employees of the, Tennessee Department of Employment Security, v. Tennessee, Case No. 88-5429, which involves a similar argument as that advanced by the parties in the instant motions. In view of the pending en banc review in Minority Employees, we grant both motions for reconsideration, but refer the determination of the merits of the motions to amend the caption to the panel assigned to determine this case upon the merits. It is therefore ORDERED that the parties address the motions to amend the caption and related

issues in their appellate briefs.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk.

INTERNATIONAL UNION, UAW; Local 217

International Union, UAW,

Plaintiffs-Appellees

v

UNITED SCREW & BOLT CORPORATION,

Defendant-Appellant.

No. 90-3972

Before MARTIN and MILBURN, Circuit
Judges, and CONTIE, Senior Circuit
Judge.

United Screw and Bolt Corporation
filed a Notice of Appeal in this case on
October 30, 1990. The Notices Caption
sets forth:

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE, AND AGRICULTURAL WORKERS OF
AMERICAL, UAW, et al.,

Plaintiffs,

vs.

UNITED SCREW AND BOLT CORP.,

Defendants.

The body of the Notice states:

NOTICE IS HEREBY GIVEN that United Screw & Bolt Corporation, the defendant in the above captioned litigation ("Defendant"), hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order of the U. S. District Court (Judge White) entered October 2, 1990 granting summary judgment for Plaintiff UAW in the above captioned matter.

Both the International union and Local 217 are parties to the agreement at issue; both were named plaintiffs in the district court proceedings. However, Local 217 is not mentioned in the Notice of Appeal. Because of this imprecise drafting and because of several opinions which refer to the requirement of naming

the appellant, we now turn to the issue of whether the appellee must be designated with the same precision.

As with most decisions interpreting procedural rules, our most important task, after fidelity to any Supreme Court decisions bearing upon the question, is to provide the understandable and practical guide to the application of the federal rules so that litigants don't innocently frustrate their access to our courts.

Minority Employees v. Tennessee Dep't of Employment Security, 901 F.2d 1327,1328 (6th Cir. 1990). To help achieve this goal, we believe it is best to set forth in detail the rule and precedents which guide our analysis. Federal Rule of Appellate Procedure 3(c) states:

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the

judgment, order or part thereof
appealed from; and shall name the
court to which the appeal is taken.
Form 1 in the Appendix of Forms is
a suggested form of a notice of
appeal. An Appeal shall not be
dismissed for informality of form
or title of the notice of appeal.

This seemingly benign rule has
repeatedly created problems for parties
on appeal. We believe this is partially
caused by the Rule's recommended Form,
which is:

Form 1. Notice of Appeal to a Court of
Appeals From a Judgment or
Order of a District Court

United States District Court for the ____
District of ____
File ____

A.B., Plaintiff

v

Notice of Appeal

C.D., Defendant

Notice is hereby given that C.D.,

dedendant above named, hereby appeals
to the United States Court of Appeals
for the ____ Circuit (from the final
judgment) (from the order (describing
it)) entered in this section on the
____ day of ____, 19____.

(S) _____

(Address)

Attorney for C.D.

This simple form is sufficient for a
notice of appeal when the action
involves only two parties, but when
three or more parties are involved the
form is, at best, misleading. We cannot
overemphasize the need for appellants in
actions involving three or more parties
to look beyond this form for guidance in
drafting a notice of appeal. The
Supreme Court decision in Torres v.
Oakland Scavenger Co., 487 U.S. 312
(1988) and our en banc decision in
Minority Employees have created--as we
have determined is necessary--

inflexible rules which are sure to trap the unwary and the uninstructed.

In Torres, the Supreme Court was confronted with the issue of whether the use of the term "et al.," used to represent a group of plaintiff-appellants, was specific enough to comply with the requirements of Rule 3(c). The Court ruled it was not; the purpose behind the specificity requirement of Rule 3(c) - to provide notice to the appellee and the court of the identity of the appellant or appellants - was not satisfied. Torres, 487 U.S. at 318.

In Minority Employees, this circuit was confronted with an analogous situation. The caption of the Notice of Appeal in Minority Employees, represented both defendants and plaintiffs with the term "et al." and the body of the notice referred to "Plaintiffs." An en banc court ruled jurisdiction over unnamed plaintiff-

appellants was barred, concluding that neither "et al." nor "plaintiffs" was sufficient to designate the appealing parties. Minority Employees, 901 F.2d 1330-1332. The court concluded that "unless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him." Id. at 1334 (Order reported at 807 F.2d 178 (9th Cir.1986), cited by Torres, 108 S. Ct. at 2407; see Santos Martinez v. Soto-Santiago, 863 F.2d 174, 176 (10th Cir.1988) ("all plaintiffs appeal" is insufficient under Fed. R. App. P. 3(c); but see Adkins v United Mine Workers), No. 90 5379, slip op. at 7-11 (6th Cir. July 18, 1991) ("all of the plaintiffs" sufficient under Fed. R. App. P. 3(c) to confer jurisdiction over all of the plaintiffs who pursued the complaint in the district court to a final judgment even though the notice of appeal specifically listed one plaintiff by name).

In the caption to its Notice of Appeal, United Screw & Bolt places the name of International union, followed by "et al." In the Notice's body, Local 217 is not specifically mentioned anywhere in the Notice. In light of broad language used in Torres and Minority Employees, we must consider whether the Notice of Appeal filed by United Screw & Bolt serves to confer this court jurisdiction over the Local 217. Torres, 487 U.S. at 314 (The failure to name a party in a notice of appeal is more than excusable "informality."); Minority Employees, 901 F.2d at 1334 ([u]nless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him," citing Order reported at 807 F.2d 178 (9th Cir. 1986). Because our holding in Minority Employees is not asymmetrical, applying only to the parties raising the appeal, we conclude that the Notice of Appeal filed by

United Screw & Bolt was sufficient to confer jurisdiction upon this court over Local 217.

The material fact which distinguishes this case from both Torres and Minority Employees is that in this case, United Screw & Bolt, the appellant, failed to specifically mention an appellee, Local 217, in its Notice of Appeal, whereas in both Torres and Minority Employees it was the party who was purportedly taking the appeal which was not named in the notice of appeal. At first blush, this might appear to be a distinction without a difference, however, on closer examination the importance of this distinction becomes readily apparent. Both Torres and Minority Employees purported to merely effectuate the express requirement of Fed. R. App. P. 3(c); significantly, Fed. R. App. P. 3(c) only requires, inter alia, that notice of appeal "specify the party or

parties taking the appeal. There is no mention of appellees; nor does the sample notice of appeal in the Forms Appendix mention naming the appellees. Instead, Rule 3(c) requires the notice of appeal to "designate the judgment, order or part thereof appealed from." United Screw & Bolt fulfilled this requirement by alluding to "the Order of the U. S. District Court (Judge White) entered October 2, 1990." Because Fed. R. App. P. 3(c) contains no requirement that the notice of appeal contain the names of the appellees, we feel it unwise to engraft such a requirement to the otherwise explicit language of Rule 3(c).

Nor do we feel that the Torres or Minority Employees decisions compel an opposite conclusion. In both of these cases, the respective courts utilized the generic term "party or parties" in discussing the notice of appeal requirements. Although this term could

logically be interpreted to apply to both appellants and appellees, closer examination of these cases reveals that the term was utilized in the context of Rule 3(c), that is, the party or parties taking the appeal.

Furthermore, the results in Torres and Minority Employees were compelled by the need "to provide notice both to the opposition and to the court of the identity of the appellant or appellants." 487 U.S. at 318, 901 F.2d at 1333. This "notice" consideration does not carry equal force when applied to the identifying the appellees. Presumably, the appellees will be identified by the specific order or judgement the appealing party lists in its notice of appeal. Ordinarily, an appeal from a final judgment draws into question all prior non-final rulings and orders, Taylor v United States 848 F.2d 715, 717-18 (6th Cir. 1978) (quoting McLaurin v Fisher 768 F.2d 98, 101 (6th

Cir. 1985). However, if an appellant chooses to designate specific determinations in his notice of appeal, only those determinations may be raised on appeal. McLaurin, 768 F.2d at 102 (citing Drayton v Jiffee Chemical Corp., 591 F2d 352, 361 n. 10 (6th Cir. 1978)). It is the order or judgment from which the appellant apperals and not the specific mention of the appellees that provided the court and any opposing parties the necessary notice. For example, in this case United Screw & Bolt appealed the district court's order which granted summary judgment to both the International union and the Local 217. Notwithstanding United Screw's failure to specifically mention the Local 217 in its Notice of Appeal, both parties were put on notice that the entire judgment which determined the legal rights with respect to each other was being called into question. If for some reason the appellant wishes to only

appeal a certain portion of a judgment he can either explicitly limit his appeal to that issue by inserting the appropriate language in his notice of appeal or appeal the entire judgment and indicate to those parties who will be unaffected by the issues he intends to raise on appeal of that fact. See Chathas v Smith, 848 F.2d 93, 94 (7th Cir. 1988) (any confusion in appellees' minds can be relieved by a letter from appellants to the them).

United Screw & Bolt indicated in its Notice of Appeal that it intended to appeal the "Order of the U.S. District Court (Judge White) entered October 2, 1990 granting summary judgment for Plaintiff UAW in the above captioned matter." Although this language is imprecise, we do not feel that this language precludes jurisdiction over both the International union and the Local 217 under Rule 3(c).

